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Allison E. Hayes

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Hayes, Allison E. (2010) "From Armbands to Douchbags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age," *Akron Law Review*: Vol. 43 : Iss. 1 , Article 7.

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FROM ARMBANDS TO DOUCHEBAGS: HOW *DONINGER V. NIEHOFF* SHOWS THE SUPREME COURT NEEDS TO ADDRESS STUDENT SPEECH IN THE CYBER AGE

*Allison E. Hayes**

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I. INTRODUCTION

The Internet has revolutionized communication, allowing people to converse instantaneously at the click of a button. Young people are beginning to use the Internet with a greater frequency and at a younger age.¹ A 2005 poll showed that 87 percent of kids aged

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12-17 use the Internet.² This speech-enhancing medium has led to numerous controversies, causing its regulation to become a flashpoint in First Amendment jurisprudence. The rising use of the Internet has presented a critical First Amendment question unique to public schools: When, if ever, may school administrators punish students for the content of their online speech? Most student blog posts create no First Amendment problems. However, student speech that solicits hitmen, makes vicious character assassinations, portrays homicidal graphic icons, proposes murder missions, and creates mock obituaries plague the online world.³ Some administrators, in search of guidance in this new area of law, have been lulled into inaction; others have silenced student speech occurring outside school grounds.⁴ What we do know, as discussed *infra*, is that there are more questions than answers in this emerging area of law.

Part II of this Note discusses the background of First Amendment student speech cases as decided by the Supreme Court as well as a unique classification of lower court holdings.⁵ Part III focuses on *Doninger v. Niehoff* in detail, including the underlying facts, competing arguments, procedural history, and the District of Connecticut's and Second Circuit's rationale.⁶ Part IV analyzes why this case was wrongly decided and argues that the Supreme Court needs to offer more guidance to lower courts so they may apply a more consistent standard in student speech cases.⁷ Further, it

gratitude; to my parents for never getting *too* mad at me for exercising my own freedom of speech; finally, I thank the *Akron Law Review* staff for all their hard work – any mistakes are mine alone.

1. See Emily Nussbaum, *Kids, the Internet, and the End of Privacy: The Greatest Generation Gap Since Rock and Roll*, Feb. 2007, at 2, available at <http://nymag.com/news/features/27341> (suggesting that Internet use in the younger generation comes easier to them than it does an older generation).

2. Pew Internet & American Life Project, *Teens and Technology: Youth are Leading the Transition to a Fully Wired and Mobile Nation* (July 27, 2005), http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf (last visited Dec. 29, 2008). This figure rose from a mere 73 percent just five years prior. *Id.*

3. See *infra* Section II.B.

4. DAVID L. HUDSON, JR., FIRST AMENDMENT CENTER, STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS? 3 (2006), <http://www.firstamendmentcenter.org/PDF/student.internetspeech.pdf>. "A big problem is that school officials do not understand the technologies or what they can and can't do legally in terms of regulating student online speech. So we are seeing inaction and overreaction." *Id.* (quoting Nancy Willard, head of the Center for Safe and Responsible Internet Use).

5. See *infra* notes 11-79 and accompanying text.

6. See *infra* notes 80-135 and accompanying text.

7. See *infra* notes 136-221 and accompanying text.

suggests a framework courts should adopt in considering a minor's First Amendment rights after school hours.⁸ Part V concludes that this case is part of an emerging area of law that will continue to create mass confusion among lower courts unless the Supreme Court sets out a universally applicable and practical standard.⁹

II. BACKGROUND

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech."¹⁰ However, not all speech is protected. The Supreme Court has declined to extend this fundamental right to include "true threats."¹¹ "True threats" encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."¹² While no person can claim a fundamental

The *Doninger* case is particularly interesting because at the appellate level, Judge Sonia Sotomayor endorsed the Second Circuit's ruling. Less than a year later, President Barack Obama nominated Judge Sotomayor to replace retiring Justice David Souter on the U.S. Supreme Court. The Senate confirmed President Obama's appointment on August 6, 2009 and Sonia Sotomayor became our nation's first Hispanic Supreme Court Justice., Lisa Desjardins et al., *Senate Confirms Sonia Sotomayor for Supreme Court*, CNNPOLITICS.COM, Aug. 6, 2009, <http://www.cnn.com/2009/POLITICS/08/06/sonia.sotomayor/index.html>. Among the President's remarks regarding Sotomayor: "a judge's job is to interpret, not make, law: to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand." The White House, Office of the Press Secretary, *Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court* (May 26, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/. In her 1997 confirmation hearing to the Second Circuit Court of Appeals, Judge Sotomayor said, "I don't believe we should bend the Constitution under any circumstance. It says what it says. We should do honor to it." The White House, Blog Post, *The President's Nominee: Judge Sonia Sotomayor* (May 26, 2009), available at <http://www.whitehouse.gov/Sotomayor/>. This Note explains why the Constitution's First Amendment has been "ben[t]" and significantly weakened by the Second Circuit's holding in *Doninger v. Niehoff* (527 F.3d 41 (2d Cir. 2008)).

8. See *infra* notes 136-221 and accompanying text.

9. See *infra* notes 222-227 and accompanying text.

10. U.S. CONST. amend. I.

11. *Watts v. United States*, 394 U.S. 705, 708 (1969). At a public rally, Mr. Watts commented that if he was forced to join the Army and made to carry a rifle, "the first man I want to get in my sights is [President] L.B.J." *Id.* at 706. Watts was charged with knowingly and willfully threatening the President. *Id.* The Court noted that public debates should be uninhibited, robust, wide-open, and sometimes consist of vehement, caustic, and unpleasant attacks on public officers. *Id.* at 708. The Supreme Court found that Watts' language may have been an offensive opposition to the President, but this political hyperbole did not amount to a true threat. *Id.*

12. *Id.* at 708. Lower courts have attempted to pinpoint the exact nature of a true threat. The Sixth Circuit has held that speech constitutes a true threat "if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious

right to speak true threats, the Supreme Court has carved out an entirely different body of First Amendment law for public school students.

A. The Supreme Court and the First Amendment in Public Schools

The following cases outline which types of student speech the Supreme Court has held the First Amendment protects and which it does not. As I will explain, the standard the Supreme Court provides is anything but precise.¹³

1. Protection of Student Expression

The first time the First Amendment was recognized to protect public school students' speech was in *West Virginia State Board of Education v. Barnette*.¹⁴ There, the West Virginia Board of Education required students to "salute" the flag while reciting the Pledge of Allegiance.¹⁵ A group of students who were Jehovah's Witnesses refused to salute on the ground that the flag was an "image" and according to their faith, the act of saluting was a forbidden form of worship.¹⁶ The children were expelled from school, and their parents sought an injunction to prevent the state from prosecuting them for causing truancy.¹⁷ The Court recognized that a school has highly discretionary educational functions, but is nonetheless a state actor

expression." *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997). The Eighth Circuit set forth a multi-factor test to determine how a reasonable person would view the speech, including:

- 1) The reaction of those who heard the alleged threat; 2) Whether the threat was conditional; 3) Whether the person who made the alleged threat communicated it directly to the object of the threat; 4) Whether the speaker had a history of making threats against the person purportedly threatened; and 5) Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

13. See *infra* note 46 and accompanying text.

14. See 319 U.S. 624, 624 (1943).

15. *Id.* at 628-29. The student was expected to "salute" the flag, by keeping his right arm stiff with his hand raised, palm facing up. *Id.* at 628 (discussing the stiff-arm salute).

16. *Id.* at 629. The Jehovah's Witness faith believes in a literal interpretation of *Exodus* 20:4-5, which states, "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." *Id.* Members of this faith consider the American flag an "image" within this interpretation and refuse to salute it. *Id.*

17. *Id.* at 629-30.

bound by the Fourteenth Amendment to respect students' First Amendment rights.¹⁸

2. *Tinker v. Des Moines Independent Community School District*

The trend toward greater respect for students' freedom of speech rights continued twenty-six years later when the Supreme Court ruled in *Tinker v. Des Moines Independent Community School District* that public school officials violated several students' First Amendment rights by suspending them for wearing black armbands to school as a silent protest of U.S. involvement in Vietnam.¹⁹ The Court began its reasoning by stating, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁰ The Court ruled that a school's fear or apprehension of a disturbance is not enough to overcome First Amendment rights.²¹ A school does not have absolute authority over its students' words.²² In order for a school to prohibit speech, it must show "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an

18. *Id.* at 637. Justice Jackson noted that the school's purpose was to educate the students without discounting important constitutional freedoms of the individual and without "strang[ling] the free mind at its source." *Id.* The Court highlighted that freedoms of speech, press, assembly, and worship do not depend on the judiciary's outcome but rather are fundamental rights susceptible to restriction only where it would "prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* at 637. Justice Jackson thought that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

What makes this case more applicable to the issue at hand is that the Court noted that even though those who refused compliance did so on religious grounds, that fact alone does not control the decision. *Id.* at 634-35. While religion supplied the motive in this instance, many citizens who have different religious views also have a compulsory right to demand constitutional protection. *Id.*

19. See 393 U.S. 503, 504 (1969).

20. *Id.* at 506.

21. *Id.* at 508. Justice Fortas noted that *any* departure from the school's absolute regimentation may cause trouble. *Id.* Any deviation from the majority may start an argument or disrupt the peace. *Id.* He believed that these risks are substantially outweighed by constitutional freedoms. See *id.*

22. *Id.* at 511. The Court stated that regardless of whether a student was in school or out of school, they are still "persons" under the Constitution. *Id.* Their comments may not be limited to only those that are officially approved. *Id.* School officials cannot suppress speech with which they do not agree or do not wish to hear. See *id.* "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of the American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The *Tinker* Court agreed with the *Shelton* Court that these children are our nation's future and wide exposure to a robust exchange of ideas leaves our future looking much brighter than succumbing to authoritative selection. *Tinker*, 393 U.S. at 512.

unpopular viewpoint.”²³ *Tinker* sets a very high standard: a student’s speech must “materially and substantially interfere” with the school’s administrative order to be prohibited.²⁴ The *Tinker* test is the baseline standard most frequently applied to student speech cases.²⁵

3. Bethel School District No. 403 v. Fraser

In 1986, the Supreme Court applied an exception to the *Tinker* standard in *Bethel School District No. 403 v. Fraser*.²⁶ In *Bethel*, Matthew Fraser delivered a speech nominating a fellow student for elective office in front of approximately 600 of his high school peers.²⁷ The speech was part of a school-sponsored assembly.²⁸ During the entire speech, Fraser referred to his friend in terms of an elaborate, graphic, and sexual metaphor.²⁹ The Court held that “[t]he constitutional rights of students in public schools are not automatically co-extensive with the rights of adults in other settings.”³⁰ The Court established a balancing test, weighing the freedom of articulating unpopular and

23. *Tinker*, 393 U.S. at 509.

24. *Id.*

25. Hudson, Jr., *supra* note 4, at 8-9. The Supreme Court’s composition at the time of the *Tinker* decision was considered liberal in many respects. *Id.* at 9. It was the same Court responsible for desegregating public schools, revolutionizing criminal procedure, and invalidating teacher-led prayer in schools. *Id.* The Supreme Court did not again visit student speech cases until the 1980s when the Court featured markedly more conservative justices. *Id.* This paradigm shift is one possible explanation for the Court beginning to limit *Tinker*’s scope by creating exceptions. *See infra* notes 26-46 and accompanying text.

26. *See* 478 U.S. 675, 685 (1986).

27. *Id.* at 677.

28. *Id.*

29. *Id.* Fraser’s speech:

I know a man who is firm – he’s firm in his pants, he’s firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds.

Jeff is a man who will go to the very end – even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president – he’ll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring in the judgment). The next day, Fraser was suspended three days for violating the school’s disruptive conduct rule. *Id.* at 678.

30. *Id.* at 682. The Court ruled that it is rightly the school board’s responsibility to make the determination of what classroom or class assembly speech is appropriate. *Id.* at 683. The Court believed that Fraser’s pervasive sexual innuendo was “plainly offensive” to both students and teachers. *Id.* Justice Burger wrote, “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” *Id.* at 685.

controversial ideas with society's countervailing interest of teaching students the values of civil discourse and where to draw the line of socially appropriate behavior.³¹ The Court held that in accordance with the school's educational mission to teach manners of civility essential to a democratic society, the school may ban "vulgar and lewd speech" that would "undermine the school's basic educational mission."³²

4. Hazelwood School District v. Kuhlmeier

Less than two years later, the Court added another exception to the *Tinker* standard when it decided *Hazelwood School District v. Kuhlmeier*.³³ In *Kuhlmeier*, a principal objected to publishing a high school newspaper that discussed teenage pregnancy and the impact of divorce upon teenagers.³⁴ The issue in this case was slightly different than those in *Tinker* and *Fraser* because it dealt with whether the school had to lend its resources to, and affirmatively endorse, the student speech with which it disagreed.³⁵ The principal reasoned that because the newspaper was part of the curriculum, educators were permitted greater deference in determining its contents to assure that the writer's views were not attributed to the school.³⁶ The Court agreed, holding, "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."³⁷

5. Morse v. Frederick

The Court did not revisit the extent to which public school students enjoy freedom of speech until 2007, when it decided *Morse v. Frederick*.³⁸ The 5-4 decision produced two concurring opinions, one concurrence in the judgment and dissent in part, and three dissents,

31. *See id.* at 681.

32. *Id.* The *Fraser* Court noted a "marked difference" between the political speech in *Tinker* and what it deemed "sexual speech" in *Fraser*. *Id.* at 679.

33. *See* 484 U.S. 260, 273 (1988).

34. *Id.* at 263.

35. *Id.* at 270-71. By contrast, *Tinker* addressed when the First Amendment required schools to tolerate student speech. Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 367 (2007) (discussing the *Kuhlmeier* exception).

36. *Kuhlmeier*, 484 U.S. at 271. The Court stated that a school must be able to take into account the intended audience's emotional maturity when determining whether it is appropriate to disseminate student speech on potentially sensitive topics. *Id.* at 272.

37. *Id.* at 273.

38. *See* 551 U.S. 393 (2007).

suggesting that the current state of the law is ambivalent at best.³⁹ In *Morse*, school officials allowed students to leave school to watch the Olympic Torch Relay pass through their city.⁴⁰ Once camera crews arrived from area news channels, Joseph Frederick and his friends unfurled a fourteen-foot banner which read “BONG HiTS 4 JESUS.”⁴¹ When Frederick refused the principal’s request to take the banner down, he was subsequently suspended from school for ten days.⁴² The Court declined to apply *Tinker*’s “substantial disruption” standard and instead held that “[t]he ‘special circumstances of the school environment’ and the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁴³

39. See *id.* at 404 (acknowledging that the mode of analysis employed in *Fraser* was not entirely clear).

40. Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 210 (2007). In 2002, the Winter Olympic Games were held in Salt Lake City, Utah. *Id.* As per custom, the Olympic Torch is passed from the site of the previous Winter Games to the current site. *Id.* On the day in question, the Torch was passing through Juneau, Alaska, where Joseph Frederick was then a senior at Juneau-Douglas High School. *Id.* The Supreme Court determined that this was a school-sanctioned and school-supervised event because it occurred during normal school hours and was sanctioned by Principal Morse as an approved social event. *Morse*, 553 U.S. at 400. The Court agreed with the school’s superintendent that Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” *Id.* at 401.

41. Schauer, *supra* note 40, at 210. Frederick claimed that the nonsense banner was simply a way to appear on television. *Morse*, 553 U.S. at 401.

42. *Morse*, 553 U.S. at 396. The Court believed that although the banner was “cryptic,” it was reasonable that the high school principal regarded it as promoting illegal drug use which directly conflicted with the established school policy prohibiting such messages at school events. *Id.* at 401. Frederick appealed his suspension to the Juneau School District Superintendent, who described Frederick’s stunt as “a fairly silly message promoting illegal drug usage in the middle of a school activity,” but nevertheless, reduced his suspension to eight days. Schauer, *supra* note 41, at 211.

43. *Morse*, 553 U.S. at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The Court reasoned that the danger in this case was far more severe than the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” set forth in *Tinker*. *Id.* The Court felt student drug abuse extends well beyond a theoretical desire to avoid controversy. *Id.*

However, the Court was unwilling to accept Morse’s argument that Frederick’s speech should fall under the *Fraser* standard as plainly offensive. *Id.* The Court stated that *Fraser* should not be stretched to prohibit any speech that could fit under some definition of “offensive.” *Id.* Chief Justice Roberts reasoned that most political and religious speech could be offensive to some. *Id.* The offensiveness of Frederick’s speech was not part of the Court’s concern, but rather, that his conduct was reasonably viewed as promoting illegal drug use. *Id.*

6. The Supreme Court Standard Summarized

Commentators greatly anticipated the *Morse* holding in hopes that the Court's decision would clarify prior Supreme Court precedent, the existing precedents' interrelationship, and the scope of each case.⁴⁴ The decision left commentators disappointed, as the Court declined to expand its holding beyond student speech promoting illegal drug use.⁴⁵ The Supreme Court left us with a standard that can be illustrated as follows: Students retain free speech rights in public schools as long as their speech does not amount to a "true threat," does not create a material and substantial disruption of school activities, or that school officials can reasonably forecast as creating a substantial disruption, unless the student's speech was vulgar, lewd, or undermined the school's basic educational mission, or unless the speech is of an offensively sexual suggestive nature, or unless the speech is school sponsored and school officials' actions are reasonably related to legitimate pedagogical concerns, or unless the speech might reasonably be understood as bearing the imprimatur of the school itself, or unless the speech advocates illegal drug use.⁴⁶ This standard is imprecise and unclear. The Supreme Court should adopt a standard whereby public school students blogging from home computers outside of school hours may exercise their First Amendment right to freedom of speech so long as their expression does not fall into a previously delineated category of unprotected speech.⁴⁷

44. Dickler, *supra* note 35, at 356.

45. See Schauer, *supra* note 40, at 222 (stating that, in granting certiorari to *Morse*, the Supreme Court did not select the most relevant case). The issue in *Morse* was unique to that case only. *Id.* By selecting a case that was not representative of student speech rights as a whole, the Court in effect refused to answer any other of the myriad of student speech issues that are plaguing the lower courts, such as *Doninger v. Niehoff*. See *infra* Section III.

46. See *Watts v. United States*, 394 U.S. 705 (1969); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 553 U.S. 393 (2007).

Confused? You are not alone. The Supreme Court offers lower courts very little guidance. Judges, lawyers, teachers, and school administrators are certainly no clearer about the state of the law even though the Supreme Court handed down a student speech decision less than two years ago in *Morse*. See *Morse*, 551 U.S. at 404 (acknowledging that the Court's earlier standards were not entirely clear, but declining to clarify the confusion in order to decide the case at hand).

47. Unprotected speech includes: 1) true threats (see *Watts v. United States*, 394 U.S. 705 (1969); *supra* notes 11-12 and accompanying text); 2) fighting words (see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942), stating fighting words are "those by which their very utterance inflict injury or tend to incite an immediate breach of the peace" and "are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); 3) incitement to riot (see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), holding a State cannot "forbid or proscribe advocacy of the use of force or of law violation

B. The Lower Courts' Attempts at Creating a Workable Standard for Student Speech Originating on the Internet

The Supreme Court held in *Reno v. ACLU* (1997) that speech on the Internet, as the most participatory form of a mass speech yet developed, is entitled to the highest level of First Amendment protection.⁴⁸ The basis of the Court's holding was that restricting indecent adult speech on the Internet to protect minors unconstitutionally infringed on an adult's freedom of speech rights.⁴⁹ Never decided by the Supreme Court, lower courts have attempted to resolve how student Internet speech fits into the current state of the law.

1. Internet Speech Brought on Campus by the Speaker

a. J.S.' Solicitation of a Hitman

In *J.S. v. Bethlehem Area School District*, an eighth-grader created a website from his home computer titled "Teacher Sux" which listed reasons why his algebra teacher should die, showed a drawing with her

except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); 4) libel/defamation (*see* *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), stating that a public official must show that the libelous statement was "made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); 5) child pornography (*see* *New York v. Ferber*, 458 U.S. 747, 764 (1982), holding that child pornography may be banned without first being deemed obscene); and 6) obscenity (*see* *Miller v. California*, 413 U.S. 15, 23-24 (1973) (reaffirming that obscene material is unprotected by the First Amendment and defining a three part test to determine whether material is obscene)).

This suggested standard is lower than that set forth in *Tinker*, and rightfully so. The *Tinker* standard was adopted for conduct that occurred on school grounds during school hours. *Tinker*, 393 U.S. at 508. For more discussion on this standard, *see infra* Part IV.C.1.

48. 521 U.S. 844, 863. The Communications Decency Act of 1996 made it a crime to knowingly transmit obscene or indecent messages to anyone under the age of 18, or to knowingly send or display to any person under the age of 18 any message that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 859-60. The Court held that the statute was overbroad and that it placed an unacceptably heavy burden on free speech. *Id.* at 882. The Court conceded that there is a governmental interest in protecting children from harmful materials, but where the indecent speech falls short of obscene, the interest does not justify unnecessarily broad suppression of speech addressed to adults. *Id.* at 875.

49. *See id.* Justice Stevens concluded the opinion by stating:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that the governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id. at 885.

head severed and dripping blood from her neck, and solicited twenty dollar donations to help pay for a hitman.⁵⁰ The court considered this to be on-campus speech because J.S. accessed the website at school, told other students about the website, and showed it to a classmate.⁵¹ The Pennsylvania Supreme Court found the website caused actual and substantial disruption of the school's operations, was the direct and indirect impact of the teacher's emotional injuries, and caused students to fear for their safety.⁵² As a result, J.S.'s permanent expulsion was upheld.⁵³

b. Layshock's MySpace Parody

In *Layshock v. Hermitage School District*, high school senior Justin Layshock created a "MySpace" page⁵⁴ on his grandmother's home computer posting a picture of his principal complete with commentary suggesting the principal was an alcoholic, a drug abuser, and a "big fag."⁵⁵ Justin informed his friends of this parody, and soon much of the student body accessed the page, causing the

50. 807 A.2d 847, 850-51 (Pa. 2002). As a result of viewing the website, the algebra teacher testified that she feared someone was going to kill her, suffered stress, anxiety, loss of appetite, loss of sleep, weight loss, and a general sense of loss of well-being. *Id.* at 852. She suffered from short-term memory loss and headaches, was required to take anti-anxiety/anti-depression medication, and was unable to converse in crowds. *Id.* The teacher was granted a medical leave for the school year causing three substitutes to fulfill her duties which "disrupted the educational process of the students." *Id.* Principal Kartsotis explained that the school's morale was the lowest he had seen in forty years of education – comparable to the death of a student or staff member. *Id.*

51. *Id.* at 865. The court considered there to be a "sufficient nexus" between the website and the school to consider the speech as occurring on campus, holding, "[w]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus." *Id.*

52. *Id.* at 869. Despite finding the statements regarding solicitation of a hitman and reasons why the teacher should die to be stated unconditionally and unequivocally, the court felt they fell short of constituting a true threat. *Id.* at 859. The court wrote:

We believe the website . . . was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm Distasteful and even highly offensive communication does not necessarily fall from First Amendment protection as a true threat simply because of its objectionable nature.

Id. at 859-60. However, the court found that the website created disorder and significantly and adversely impacted education, particularly considering the student and staff's feeling of helplessness and low spirits. *Id.* at 869.

53. *Id.* at 847.

54. MySpace.com is a website where users can share photos, journals, and personal interests with other users who have created profiles. 412 F. Supp. 2d 502, 504 (W.D. Pa. 2006).

55. *Id.* at 505.

school to shut down the computer system for five days.⁵⁶ A federal judge denied Justin's request for a temporary restraining order, holding Justin's actions substantially disrupted school operations and interfered with the rights of others.⁵⁷

2. Internet Speech Brought on Campus by Another Student

a. Wisniewski's Buddy Icon

In *Wisniewski v. Board of Education of the Weedsport Central School District*, eighth-grader Martin Wisniewski created an AOL Instant Messenger "buddy icon"⁵⁸ of a pistol firing a bullet above a

56. *Id.* at 508. The lack of access to the computer system caused the school to cancel several classes and students were not able to access the computers for school purposes. *Id.* at 508. The school district's technology coordinator estimated that during this five-day period he spent 25 percent of his time blocking numerous addresses from which students were attempting to access MySpace profiles on school computers and setting up firewalls to prohibit access to the website. *Id.* The school's co-principal testified that he dedicated at least 25 to 30 percent of his time dealing with the disruptions and investigating the source of the parody. *Id.*

57. *Id.* The court found that Justin's conduct did not fall within a *Tinker* exception, so it could only be regulated if it substantially disrupted school operations or interfered with the rights of others. *Id.* at 507.

Justin was suspended for ten days, placed in the Alternative Curriculum Education Program, banned from attending or participating in any school sponsored events, and prohibited from attending his graduation ceremony. *Id.* at 505. The court commented that it thought Justin's punishment was extreme, noting, "[a]lthough the punishment inflicted upon Justin for his conduct is arguably excessive, the Court is not empowered to second-guess the appropriateness of Defendants' actions absent some underlying violation of his legal rights" and that "in this case the public interest is best served by allowing defendants to administer their high school and discipline their students as they determine, despite the Court's reservations regarding the appropriateness of Justin's punishment." *Id.* at 509.

The American Civil Liberties Union of Connecticut ("ACLU-CT") argued that Justin's punishment should not have been upheld. Brief of Amicus Curiae, ACLU of Connecticut, in Support of Plaintiff's Motion for a Temporary Restraining Order/Preliminary Injunction, *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007) (No. 3:07-cv-1129) [hereinafter ACLU-CT Brief].

[N]either the principal's distraught reaction, nor the "offensive[ness]" and "unpleasantness" of the speech, nor the fact that students had "buzz[ed]" about the profile, nor the fact that one computer teacher had threatened to shut down the school's computer system . . . nor the fact that the speech was "rude and demeaning," could persuade a reasonable jury to find the disruption sufficient. In order for that to happen, the disruption would have to be so severe as to cause, or threaten to cause, consequences such as class cancellations, widespread disorder, violence, or student disciplinary action, or to render teachers "incapable of teaching or controlling their classes."

Id. at 10.

58. AOL Instant Messenger allows a person to exchange messages in real time with members who have the same AOL software on their computer. 494 F.3d 34, 35 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008). The program enables users to transmit an icon, created by the sender, on the computer screen during an IM exchange. *Id.* at 36. The image remains on the screen for the duration of the online conversation. *Id.* at 35.

person's head, complete with splattered blood and the words "Kill Mr. VanderMolen," despite the administration's warning a few weeks prior that threats would be treated as acts of violence and would not be tolerated.⁵⁹ During the three-week period he used the icon, Martin chatted with fifteen of his friends.⁶⁰ When a classmate told Mr. VanderMolen of Martin's icon, the school suspended Martin for a semester.⁶¹ Given the content of the icon, Martin's distribution of it, and the period of time he used it, the Second Circuit concluded that Martin's conduct crossed the protected student speech boundary, that it posed a reasonably foreseeable risk that the icon would come to the attention of school authorities, and that it materially and substantially disrupted the school's operations.⁶²

b. Paul's Top Ten List

In *Killion v. Franklin Regional School District*, high school student Zachariah Paul emailed a number of his friends a "Top Ten" list about the school's athletic director, which contained statements about the athletic director's appearance, including the size of his genitals.⁶³ An undisclosed student distributed Zachariah's email on school grounds and copies were found in the teachers' lounge, resulting in Zachariah's ten-day suspension.⁶⁴ The court granted Zachariah's motion for summary judgment because the list was created off school grounds, there was no

59. *Id.* at 36.

60. *Id.*

61. *Id.*

62. *Id.* at 39-40. The court confirmed prior precedent that off-campus conduct could create a foreseeable risk of substantial disruption within a school. *Id.* at 39. In discussing the extent of the discipline, the court was mindful that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Id.* at 40.

63. 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001). The list read as follows:

10) The School Store doesn't sell twinkies. 9) He is constantly tripping over his own chins. 8) The girls at the 900 #'s [sic] keep hanging up on him. 7) For him, becoming Franklin's "Athletic Director" was considered "moving up in the world." 6) He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time. 5) As stated in previous list, he's just not getting any. 4) He is no longer allowed in any "All You Can Eat" restaurants. 3) He has constant flashbacks of when he was in high school and the athletes used to pick on him, instead of him picking on the athletes. 2) Because of his extensive gut factor, the "man" hasn't seen his own penis in over a decade. 1) Even it is [sic] wasn't for his gut, it would still take a magnifying glass and extensive searching to find it.

Id. at 448.

64. *Id.* at 448-49.

evidence that Zachariah brought the list onto school grounds, and the school district failed to satisfy *Tinker*'s substantial disruption standard.⁶⁵

c. Beussink's Critical Webpage

In *Beussink v. Woodland R-IV School District*, high school junior Brandon Beussink created a website at home on his personal computer which was "highly critical" of Woodland's administration.⁶⁶ Brandon used vulgar language to convey his opinions and invited readers to contact the school's principal to express their beliefs regarding Woodland High School.⁶⁷ Another student, who found Brandon's website while using Brandon's home computer, accessed the site at school and showed it to the school's computer teacher.⁶⁸ Consequently, Brandon was suspended ten-days and ordered to shut down his website.⁶⁹ The court granted Brandon a preliminary injunction, finding he would likely succeed on the merits because the school's discipline stemmed from him expressing an opinion which upset the administration, but fell short of *Tinker*'s standard of causing a material or substantial disruption.⁷⁰

65. *Id.* at 458. The court noted that the speech at issue was not threatening, and although it upset the athletic director, it did not cause any faculty member to take a leave of absence as in *J.S.* *Id.* at 455. "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." *Id.* The court agreed with the plaintiff's argument that Zachariah was not engaged in any school activity or associated in any way with his role as a student when he compiled the "Top Ten" list. *Id.* at 456. Had he distributed the list outside of the school environment, he could not have been punished because the government considered the content inappropriate. *Id.* at 456-457. The court followed, "[w]hen school officials are authorized to punish only the speech which occurs on school property, the student is free to speak his mind when the school day ends" and First Amendment protection "may not be made a casualty of the effort to force-feed good manners to the ruffians among us." *Id.* at 457.

66. 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). Brandon testified that he created the website to voice his opinion, never intending it to be accessed or viewed at school. *Id.*

67. *Id.* Brandon's website contained a hyperlink which allowed the user to access Woodland High School's homepage. *Id.*

68. *Id.* at 1177-78. Brandon allowed a friend, Amanda Brown, to use his home computer. *Id.* at 1177. While using the computer, Amanda saw Brandon's website. *Id.* Brandon and Amanda subsequently got into an argument, and in an effort to retaliate, Amanda purposefully accessed Brandon's website at school. *Id.* at 1177-78. Amanda testified that she did not access the website at Brandon's request, with his authorization, or with his knowledge. *Id.* at 1178.

69. *Id.* at 1179. The principal testified that he made the determination to punish Brandon immediately upon accessing the website. *Id.* at 1180. The court concluded that this testimony did not indicate that the principal disciplined Brandon based on a fear of substantial disruption but because he was upset by the website's content. *Id.*

70. *Id.* The court did not find evidence that Brandon showed the website to other students nor that Amanda's viewing the website at school caused a disturbance. *Id.* at 1178-79. The court reasoned that if the threat of punishment remained, Brandon and other students had been effectively

3. Internet Speech that may Foreseeably Reach Campus

a. Mahaffey's Satanic Support

In *Mahaffey v. Aldrich*, high school student Joshua Mahaffey created a website entitled "Satan's web page," which listed people he wished would die and gave readers a murder "mission."⁷¹ A classmate's parent notified the police about the website.⁷² Although the police did not pursue criminal charges, the school district determined the website violated the school's computer use policy.⁷³ The district court found that there was no evidence that the website interfered with the school's duties, thus failing the *Tinker* standard.⁷⁴

b. Emmett's Mock Obituaries

In *Emmett v. Kent School District No. 415*, eighteen-year-old high school senior Nick Emmett created a webpage containing mock

denied their constitutional right to engage in free speech. *Id.* at 1181. The court emphatically noted:

One of the core functions of free speech is to invite dispute. "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."

Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the *First Amendment*. Popular speech is not likely to provoke censure. It is unpopular speech which needs the protection of the *First Amendment*. The *First Amendment* was designed for this very purpose.

Id. at 1181-82 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). Likewise, the court believed Brandon was punished for speech that was constitutionally protected. *Id.* at 1181.

71. 236 F. Supp. 2d 779, 781-82 (E.D. Mich. 2002). Near the bottom of Joshua's website, the page read:

SATAN'S MISSION FOR YOU THIS

WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do it. unless Im there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi.

PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?

Id. at 781 (all grammatical errors and capitalizations are part of the original).

72. *Id.* at 782.

73. *Id.* According to a police officer's testimony, Joshua admitted contributing to the website and stated that school computers "may have" been used in creating the site. *Id.* The school suspended Joshua for his contributions. *Id.*

74. *Id.* at 784. The court agreed with the plaintiffs that school officials had exceeded their powers when they punished Joshua for his out of school conduct. *See id.* The court also ruled that Joshua's actions fell short of constituting a "true threat" because there was no evidence Joshua communicated the website's statements to anyone. *Id.* at 786. Likewise, a reasonable person would not interpret Joshua's remarks as intending to harm or kill anyone listed on the website. *Id.* at 786.

“obituaries” of two of Nick’s friends.⁷⁵ When an evening television news story featured Nick’s webpage as a “hit list” of people to be killed, Nick immediately removed his site from the Internet.⁷⁶ Nevertheless, the next day the principal placed Nick on emergency expulsion.⁷⁷ The district court granted Nick’s motion for a temporary restraining order, reasoning that Nick’s speech fell outside of the *Fraser* and *Kuhlmeier* exceptions because they were not in a school assembly, in a school-sponsored newspaper, or affiliated with any school project.⁷⁸ The court determined the school district failed to meet *Tinker*’s substantial disruption standard and “[a]lthough the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.”⁷⁹

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

During the 2006-2007 school year, Avery Doninger was a 16-year-old junior at Lewis S. Mills High School (“LMHS”).⁸⁰ As the Junior Class Secretary and a member of Student Council,⁸¹ Avery was largely responsible for coordinating “Jamfest,” an annual “battle of the bands” concert held at LMHS.⁸² Due to the construction of a new auditorium and scheduling conflicts, students were concerned Jamfest might have to take place in an alternate venue, be postponed from the much anticipated April 28, 2007 date, or be cancelled altogether.⁸³ Jamfest had already

75. 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). The court emphasized that Nick carried a 3.95 GPA, was a co-captain of the school’s basketball team, and had no disciplinary history. *Id.* The webpage also contained commentary on the school’s administration and allowed visitors to vote on who would “die” next – that is, who would be the subject of the next mock obituary. *Id.* It was modified by disclaimers warning visitors that the site was for entertainment purposes only and was not school-sponsored. *Id.* The obituaries were written “tongue-in-cheek,” inspired by a creative writing class which assigned students to write their own obituary. *Id.*

76. *Id.*

77. *Id.* The emergency expulsion was later modified to a five-day short-term suspension. *Id.*

78. *Id.* The court noted that the school failed to present evidence that the mock obituaries and voting were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever. *Id.* at 1090. This, combined with the speech’s off-campus nature, indicated that Nick had a substantial likelihood of success on his claim’s merits. *Id.*

79. *Id.* at 1090.

80. Doninger v. Niehoff, 514 F. Supp. 2d 199, 203 (D. Conn. 2007). The district court referred to Avery as “poised, intelligent, and articulate.” *Id.* at 202.

81. Doninger v. Niehoff, 527 F.3d 41, 44 (2d Cir. 2008).

82. Doninger, 514 F. Supp. 2d at 203.

83. *Id.* at 203-04.

been postponed twice.⁸⁴ Because the school year was drawing to a close, students thought that a later date might not be available, or that even if a new date were agreed upon, some of the bands might refuse to play, out of frustration.⁸⁵ In addition, the teacher responsible for operating the highly technical light and sound systems in the new auditorium was unavailable on April 28, 2007.⁸⁶

During the morning of April 24, 2007, Avery and three other students sent a mass email to the city's taxpayers explaining the students' dilemma and asking for their support to convince the administration to hold the concert in the school's auditorium, despite the scheduling conflict.⁸⁷ Around noon the same day, Avery encountered Principal Karissa Niehoff, visibly upset, in the hallway.⁸⁸ Principal Niehoff had been called away from her long-scheduled in-service training day to respond to the influx of calls and emails received as a result of the students' email.⁸⁹ Avery claimed that Principal Niehoff told her that Jamfest had been cancelled.⁹⁰ Principal Niehoff testified that she told Avery she was disappointed in the students' decision to send the email, but that she was open to rescheduling Jamfest so it could be held in the auditorium on a different date.⁹¹ Principal Niehoff also testified that she told Avery that the students violated the school's internet policy by sending the email.⁹² Principal Niehoff stated she informed Avery that

84. *Id.* at 203.

85. *Id.* at 203-04.

86. *Id.* at 204. The students later learned that the regional Board of Education policy required that particular teacher's presence at all such events in the new auditorium. *Id.*

87. *Id.* at 205. The parties disagree as to who suggested sending the email. According to Avery, a faculty advisor insinuated that the students explain their situation via a mass email to the taxpayers in hopes of enlisting their support. *Id.* at 204. The faculty advisor testified that her recommendation was for the students to compile a list of reasons Jamfest should continue as planned, which they could present to the school's administration. *Id.* The other students involved presented testimony somewhere between Avery's and the faculty advisor's version of events. *Id.* One student in the group accessed his father's address book and extracted the majority of the addresses for the email. *Id.* at 205. The email explained the Jamfest situation to the taxpayers and asked them to contact the central office and to "forward [the email] to as many people as you can." *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* In the defendants' brief, they argued that both Avery and Lauren Doninger, Avery's mother, signed an Acceptable Use Agreement that stated that the Internet was not to be used for any reason other than educational purposes. Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 4, *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. Aug. 20, 2007) (No. 3:07-cv-1129) [hereinafter *Opposition to Preliminary Injunction*]. The agreement provided, in relevant part: "I understand that this access is designed for educational purposes Should I

the students acted in a manner that was inappropriate for class officers.⁹³ Principal Niehoff was distressed because she and Superintendent Schwartz were late to, or forced to miss, several other school-related activities scheduled for April 24 and 25, 2007.⁹⁴ They both received “numerous” phone calls and emails from taxpayers.⁹⁵

At approximately 9:30 P.M. on April 24, 2007, still upset from her conversation with Principal Niehoff, Avery posted an entry to her LiveJournal.com⁹⁶ blog from her home computer which referred to the administration as “douchebags” and suggested she would support her readers if they wrote Superintendent Schwartz or “call[ed] her to piss her off more.”⁹⁷

The next morning, April 25, 2007, Principal Niehoff and Superintendent Schwartz continued receiving phone calls and emails regarding Jamfest.⁹⁸ The same four students who signed the taxpayer email met with Principal Niehoff and Superintendent Schwartz to talk about scheduling the concert at a later date.⁹⁹ Principal Niehoff asked

commit any violation, of said policy or corresponding procedures and guidelines, my access privileges may be revoked, and school disciplinary action as deemed appropriate by the administration and/or appropriate legal action may be taken.” *Id.*

93. *Doninger*, 514 F. Supp. 2d at 205.

94. *Id.* at 206.

95. *Id.*

96. LiveJournal.com is “[a] blogging platform and online community built around personal journals.” LiveJournal Inc. – About Us, <http://www.livejournalinc.com/aboutus.php> (last visited Sept. 27, 2008). A visitor need not be registered to view other user’s blogs unless the user has adjusted her privacy settings to restrict access. *Doninger*, 514 F. Supp. 2d at 206. On April 24, 2007 Avery’s blog setting was “public.” *Id.* LiveJournal.com is a website unaffiliated with LMHS. *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008).

97. *Doninger*, 527 F.3d at 45. Avery’s LiveJournal blog stated:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren’t going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. anddd..here is the letter we sent out to parents. [The entry then reproduced the email from earlier in the day.]

And here is a letter my mom sent to Paula and cc’d Karissa to get an idea of what to write if you want to write something or call her to piss her off more. im down.--

Id. (all misspellings and grammatical errors are part of the original blog post). Avery then reproduced an email Ms. Doninger had sent Superintendent Schwartz earlier in the day. *Id.* Several LMHS students commented on Avery’s blog post, including one student who referred to Superintendent Schwartz as a “dirty whore.” *Doninger*, 514 F. Supp. 2d at 207.

98. *Doninger*, 527 F.3d at 45.

99. *Doninger*, 514 F. Supp. 2d at 207. Also present at the meeting were the students’ faculty advisor, the teacher in charge of the highly technical light and sound system, and the building and grounds supervisor. *Id.* None of the staff present knew of Avery’s blog post at the meeting. *Id.*

the students to send out a clarifying email.¹⁰⁰ She further spoke to the students about the proper role of student officers and how they should resolve such issues in the future, making it clear that mass emails to taxpayers were not acceptable.¹⁰¹

It was not until May 7, 2007 that the administration found out about Avery's blog post.¹⁰² On May 17, 2007, Avery was called into Principal Niehoff's office and asked to do three things: (1) apologize to Superintendent Schwartz; (2) show the post to her mother; and (3) withdraw from running for Senior Class Secretary.¹⁰³ Avery performed the first two, but refused to withdraw and subsequently won a plurality of the votes by virtue of a write-in campaign.¹⁰⁴ Nonetheless, Avery was not permitted to serve as Senior Class Secretary.¹⁰⁵ Principal Niehoff

The administrators offered the students the option of holding Jamfest in the cafeteria on April 28, 2007, or in the auditorium at a later date. *Id.* The students chose the latter. *Id.* Jamfest was successfully held in the auditorium on June 8, 2007, and all but one of the bands participated. *Id.*

100. *Id.*

101. *Id.*

102. *Doninger*, 527 F.3d at 46. According to Superintendent Schwartz's testimony, she alerted Principal Niehoff of Avery's blog post after her adult son found it while using an internet search engine. *Id.*

103. *Doninger*, 514 F. Supp. 2d at 207. Principal Niehoff testified that her decision was based on Avery's blatant disregard of Principal Niehoff's suggestion regarding the proper means of expressing disagreement with the school's administration and also because the post used vulgar language and inaccurate information. *Id.* at 208. Additionally, Principal Niehoff did not think it appropriate of a class officer to encourage taxpayers to contact the central office "to piss [Superintendent Schwartz] off more." *Id.* There was a factual dispute as to whether Principal Niehoff permitted Avery to maintain her position as Junior Class Secretary. *Id.* Again, the court adopted Principal Niehoff's testimony that Avery was permitted to finish her term. *Id.*

Six days later, Avery wrote her apology to Superintendent Schwartz, stating: "Please accept my apology for the tone and language of the Live Journal entry that I posted on April 24th." *Id.* It is undisputed that Avery also showed her blog to Ms. Doninger. *See id.* (stating Ms. Doninger emailed Principal Niehoff and referred to Avery's blog as "offensive" but urged that Avery's punishment was "an over reaching response with enormous consequences" and begged for a more appropriate punishment).

104. *Id.* at 208. Class elections were held on May 25, 2007. *Id.* One of Avery's friends made t-shirts in her honor that read "Team Avery" on the front and "Support LSM Freedom of Speech" on the back and passed them out to a group of students. *Id.* Avery wore a t-shirt that said "R.I.P. Democracy." *Id.* Principal Niehoff prevented the students wearing the "Team Avery" shirts from hearing the candidacy speeches unless they removed their t-shirts, stating it was not her intention "to permit electioneering materials of any kind into the auditorium for the election assembly" on the grounds that it might unfairly prejudice the students who did not have the same resources. *Id.*

105. *Id.* at 209. In an email to Ms. Doninger, Principal Niehoff reasoned, "Avery received a consequence because she posted the extremely disrespectful blog despite previous conversations with her addressing the Jamfest event, the use of the auditorium, and appropriate conduct as a class officer." *Id.*

explicitly denied that the email from April 24, 2007 was the basis of any disciplinary action.¹⁰⁶

B. Competing Arguments

1. Avery's Argument

Avery argued that the administration violated her First Amendment rights when they prevented her from running for Senior Class Secretary and when they did not permit her to wear a "Team Avery" t-shirt into the auditorium on May 25, 2007.¹⁰⁷ She contended that because her blog post took place within the confines of her home, the administration reached beyond its authority in disciplining Avery.¹⁰⁸ In light of the "equities tipping sharply in [her] favor" and the administration's persistent violation of Avery's constitutional rights, Doninger contended a temporary injunction should be granted in order to prevent future irreparable harm.¹⁰⁹

2. Administration's Argument

Principal Niehoff and Superintendent Schwartz argued that Avery failed to demonstrate irreparable harm because she had no "right" to

106. *Id.* The district court credited Principal Niehoff's testimony because none of the other three students who signed the Jamfest email made blog posts similar to Avery's. *Id.* As such, the other students did not receive any disciplinary action and were permitted to run for class officer and Student Council. *Id.*

107. *Id.* at 211. The complaint also alleged that the school's administration denied Avery's First Amendment protection when she was not permitted to give a speech during the class elections held on May 25, 2007. *Id.* The court considered this sanction to be synonymous with the school preventing Avery from running for Senior Class Secretary for purposes of its analysis. *Id.* The court did not consider any First Amendment claims relating to the students' Jamfest email. *Id.*

Doninger's attorney also argued that balancing the relative harms easily justified granting a temporary injunction because without it, she would continue to be deprived of her fundamental right to Freedom of Speech, Equal Protection, and Due Process. Memorandum of Law in Support of Plaintiff's Application for Temporary Injunction at 15, *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. July 26, 2007) (No. 3:07-cv-1129) [hereinafter Application for Temporary Injunction]. In contrast, if a temporary injunction was granted, the defendants' only "hardship" would be holding another election for Senior Class Secretary and allowing Avery the opportunity to give a speech to her class. *Id.* According to Attorney Schoenhorn, "[b]asically, [the injunction] requires the defendants to start obeying the law – a burden that should not be onerous to them." *Id.*

108. *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008). Avery maintained that her blog did not contain "fighting words," "true threats," or other exceptions to her absolute right to free speech. Application for Temporary Injunction, *supra* note 107, at 5.

109. Application for Temporary Injunction, *supra* note 107, at 5; *see also infra* note 115 (listing the elements of a preliminary injunction).

serve as a class secretary.¹¹⁰ Further, the administrators alleged that Avery could not demonstrate the likelihood of success on the case's merits because their actions did not violate Avery's constitutional rights.¹¹¹ As such, the defendants explained that Avery's motion for temporary injunction should be denied.¹¹²

C. Procedural History

Lauren Doninger filed an action against Karissa Niehoff and Paula Schwartz in Connecticut Superior Court on Avery's behalf.¹¹³ The complaint alleged a violation of 42 U.S.C. § 1983 and analogous clauses of the Connecticut Constitution.¹¹⁴ Doninger sought a preliminary injunction¹¹⁵ asking the court to void the election for Senior Class

110. Opposition to Preliminary Injunction, *supra* note 92, at 14. Defendants argued that participation in extracurricular activities, such as student council and athletics, as per the Board of Education policy, is a privilege, not a right. *Id.* at 15. The Board policy states:

All students elected student officers, or who represent their schools in extracurricular activities, shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student's principal

Id. at 14.

111. *Id.* at 17. Specifically, the defendants argued the following: 1) Avery's speech did not deal with a matter of public concern and therefore is not constitutionally protected speech; 2) Principal Niehoff and Superintendent Schwartz did not violate Avery's right to free speech because the speech was antithetical to the mission of Regional School District #10, vulgar, and knowingly false; 3) it was reasonable for the defendants to believe that the speech at issue would cause disruption; 4) Avery was not given consequences because of her speech's content, but because her conduct caused disruption; 5) pursuant to the Supreme Court's decision in *Morse v. Frederick*, Avery's speech is not constitutionally protected; 6) the defendants did not violate Avery's right to free speech when they requested the t-shirts not be worn to a school assembly; 7) the defendants did not violate Avery's right to Due Process; 8) the defendants did not violate Avery's right of Equal Protection; and 9) the Connecticut Constitution does not provide greater free speech protection than the United States Constitution regarding student speech. See Opposition to Preliminary Injunction, *supra* note 92.

112. *Id.* at 40.

113. *Doninger*, 527 F.3d at 46-47.

114. *Id.* Ms. Doninger alleged violations of Avery's Freedom of Speech rights under the United States Constitution's First Amendment, her Due Process and Equal Protection rights under the Fourteenth Amendment, and asserted a cause of action under state tort law for Intentional Infliction of Emotional Distress. *Id.*

115. To obtain a preliminary injunction, "[a] plaintiff must establish the following: (1) irreparable harm; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in her favor." *Doninger*, 514 F. Supp. 2d at 209-10. Irreparable harm is established any time there is a First Amendment violation. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* "There are no *de*

Secretary, remove the student now serving as class secretary, hold a new election in which Avery could run, and to permit Avery, as an elected class officer, to speak at the 2008 commencement ceremony.¹¹⁶ The defendants removed the action to federal court.¹¹⁷

1. United States District Court for the District of Connecticut's Decision

The district court noted that this case was different from both *Tinker* and *Fraser* because the punishment terminated Avery's participation in voluntary, extracurricular activities.¹¹⁸ The court thought the case was closer to *Fraser*,¹¹⁹ but did not believe that it should determine whether disqualifying Avery from running for class secretary was a "fitting punishment" under the circumstances because that was for school officials to decide.¹²⁰ The court established that the only issue at stake was whether Avery had shown a substantial likelihood of succeeding in her claim that the defendants' actions violated her constitutional rights.¹²¹ The court ruled that Avery had not satisfied that burden.¹²² In so reasoning, the district court acknowledged

minimis violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2004).

116. *Doninger*, 527 F.3d at 47. Plaintiff's Motion for Injunction argued a basis for a temporary injunction spanning fourteen paragraphs. Application for Temporary Injunction and Order to Show Cause at 1, *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. July 26, 2007) (No. 3:07-cv-1129) [hereinafter Application for Temporary Injunction] (essentially plaintiff requested the district court to bar defendants from continuing to violate Avery's First Amendment right to Freedom of Speech, her right to Equal Protection, and her right to Due Process).

117. *Doninger*, 527 F.3d at 47.

118. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213 (D. Conn. 2007). The court commented that Avery's education was not impeded by her punishment and that she did not have a First Amendment right to "run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators." *Id.* at 216.

119. *Id.* at 216.

120. *Id.* at 202. The district court reasoned:

It may well be that a more relaxed or more self-assured administration would have let the incident pass without declaring [the student] ineligible [to run for class office], and perhaps that is what this administration ought to have done; it is not for us to say. Such a question, we believe, represents a judgment call best left to the locally elected school board, not to a distant, life-tenured judiciary.

See id. (quoting *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989)).

121. *Id.* at 202.

122. *Id.* The court assured that there were no villains in this case. *Id.* at 203. The judges believed Avery to be a good student and the defendants were not "tyrants bent on curbing the constitutional rights of all who criticize them." *Id.*

The court determined that neither *Doninger's* application of the *Tinker* standard, nor the defendants' application of the *Fraser* standard provided the appropriate framework in the case at hand. *Id.* at 213. The court adopted the position of other circuits by affording great discretion to

that school officials have a difficult task of balancing the importance of teaching children to think critically with the values of civil discourse.¹²³ The court was uncertain whether the administration struck the right balance in this instance, but was confident that the Constitution did not forbid the action they chose.¹²⁴

2. Second Circuit Court of Appeals Decision

The Second Circuit affirmed the district court's holding that Avery failed to make an appropriate showing on both her First Amendment and Equal Protection claims, although it did so on different grounds.¹²⁵ The court was unclear whether *Fraser* applied to off-campus speech, but concluded that the *Tinker* standard was adequately established.¹²⁶ The Second Circuit recognized the lack of Supreme Court guidance of a school's authority to regulate off-campus speech.¹²⁷ While the court may not have agreed with her punishment, it concluded that it was not authorized to intervene absent "violations of specific constitutional guarantees."¹²⁸

school administrators in deciding whether a student is eligible to participate in extracurricular activities, holding "participation in extracurricular activities . . . is a privilege, not a right." *Id.* at 214 (quoting Charles J. Russo & Ralph D. Mawdsey, *Education Law* 4.05[1], at 4-20 to 4-21) (citing *Felton v. Fayette Sch. Dist.*, 875 F.2d 191 (8th Cir. 1989) (upholding summary judgment in favor of school district because student had violated school's good citizenship rule in stealing auto parts while participating in the school's off-campus special vocational program)).

123. *Doninger*, 514 F. Supp. 2d at 202.

124. *Id.*

125. *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008).

126. *Id.* at 50. Therefore, the court did not decide the extent of *Fraser*: "We therefore need not decide whether other standards may apply." *Id.* However, because the Second Circuit declined to decide Avery's case under a *Fraser* standard, the court may have "intended to gently telegraph to the [district court] that it erred in its analysis of *Fraser*." *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 221 (D. Conn. 2009).

127. *Doninger*, 527 F.3d at 48. In the 40 years since the *Tinker* decision, there have been only three Supreme Court cases dealing with a student's right to free speech, despite significantly more litigation in the lower courts on this subject. See *Hazelwood School Dist. No. 403 v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 553 U.S. 393 (2007). The Second Circuit has previously held that a student may be disciplined for expressive conduct, even if the speech occurred off school grounds, when the conduct "would create a risk of substantial disruption within the school environment" provided it was foreseeable that the expression might make its way onto campus. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (U.S. 2008) (following the *Tinker* standard). The court followed this reasoning in holding that Avery's conduct posed a substantial risk that LMHS administrators would further be diverted from their core educational responsibilities in order to repel incessant emails and phone calls. *Doninger*, 527 F.3d at 51-52.

128. *Doninger*, 527 F.3d at 54.

3. Reaching the Merits

It was not until January 2009 that the district court decided both parties' motions for summary judgment.¹²⁹ The defendants argued that they were entitled to summary judgment because of the court rulings at the preliminary injunction hearing.¹³⁰ Avery contended that she was entitled to a trial on her First Amendment claims because of new evidence refuting the Second Circuit's analysis.¹³¹ The district court granted defendants' motion for summary judgment on Avery's blog entry First Amendment claim, Equal Protection claim, and Intentional Infliction of Emotional Distress claim.¹³² The court denied defendants' motion for Avery's First Amendment t-shirt claim.¹³³ Avery's motion for summary judgment was denied.¹³⁴ It is important to note that the district court may have hedged its ruling of the preliminary injunction hearings, noting that current First Amendment jurisprudence needed

129. See *Doninger*, 594 F. Supp. 2d at 211.

130. *Id.* at 218.

131. *Id.* Avery also thought there was conflicting evidence which could show that she was punished simply because Principal Niehoff found her blog offensive. *Id.* Avery's attorney argued that the defendants "may have perpetuated a fraud upon this court and continue to do so by asserting facts that are clearly untrue." Plaintiff's Memorandum of Law in Objection to Defendants' Motion for Summary Judgment at 1, *Doninger v. Niehoff*, 594 F. Supp. 2d 211 (D. Conn. Aug. 20, 2008) (No. 3:07-cv-1129) [hereinafter *Objection to Summary Judgment*]. Among other things, this Memo points to newly discovered emails in which Principal Niehoff states she has "no problem being the bad guy" and that she does not care that she must miss a health seminar. *Doninger*, 594 F. Supp. 2d at 218.

132. *Doninger*, 594 F. Supp. 2d at 221, 224, 230. The court believed that the defendants were entitled to qualified immunity as to Avery's blog entry First Amendment claim because even courts and legal scholars could not distinguish the contours of student Internet speech protection. *Id.* at 224. It was unreasonable to expect school officials to predict where the line would be drawn in this new technological era. *Id.* Avery's Equal Protection and Intentional Infliction of Emotional Distress claims are not considered in this Note.

133. *Id.* at 226-27. The court pointed to a factual dispute that would permit a reasonable jury to conclude that Principal Niehoff may or may not have "chilled" Avery's speech in forbidding students to wear "Team Avery" t-shirts to the student class officer elections. *Id.* at 226.

134. *Id.* at 219. Even in the light most favorable to Avery, the court was "unconvinced that this new evidence, without more, creates a genuine issue of material fact. Although there may be a factual dispute about whether the blog entry was false, there was no doubt that it was misleading." *Id.* According to the court, Avery's blog suggested that Jamfest was cancelled entirely, when there was conflicting evidence whether the students were given the option to reschedule the concert in the auditorium at a later date. *Id.* The court also noted that it denied Avery's preliminary injunction based on the fact that Avery's punishment may have been, in part, because her blog entry was offensive and uncivil. *Id.* at 219. The court continued this rationale in denying Avery's motion for summary judgment because "school administrators may have multiple motivations for their actions. It is possible that Ms. Niehoff was motivated both by the potential for disruption and by the offensive nature of the blog entry." *Id.* at 220.

much evolution because “the contours of the law in this area are still unclear.”¹³⁵

IV. ANALYSIS

A. The Doninger Courts Misinterpreted Supreme Court Precedent

The Supreme Court has not yet provided the necessary guidance to decide student cyberspeech cases.¹³⁶ All four of the cases the Court decided deal with speech occurring on-campus (*Tinker* and *Fraser*) or during a school-sanctioned activity off-campus (*Kuhlmeier* and *Morse*). Avery’s speech is far different because it originated in her own home outside of school hours, thus lacking a geographical nexus to the school. There is a seeming disconnect between the student expression and any actual disruption to the classroom.¹³⁷ Many lower courts apply ad hoc tests in hopes of striking an adequate balance between: (1) a school’s legitimate and compelling interests in ensuring the safety of both the student body and the educational process, and (2) allowing kids to be kids – managing students’ rising use of the Internet as a medium to convey their often immature and incoherent speech, which may lash out at school administrators, teachers, and peers (in hardly the most sophisticated of ways).¹³⁸ Because there is no more applicable standard, the legal standard most scholars employ is *Tinker*’s material or substantial disruption, unless the speech is indecent, lewd, vulgar, or

135. *Id.* at 223-24.

136. *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008). “The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that, like Avery’s, does not occur on school grounds or at a school-sponsored event.” *Id.* The Second Circuit noted that they have visited this issue before when deciding that a student may be disciplined for expressive conduct off school grounds when this conduct “‘would foreseeably create a risk of substantial disruption within the school environment’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.” *Id.* (citing *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (U.S. 2008)). Here, the court observed the need to “draw a clear line between student activity that ‘affects matter[s] of legitimate concern to the school community,’ and activity that does not.” *Id.* (citing *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1058 (2d Cir. 1979) (Newman, J., concurring in the result)).

137. Mary-Rose Papandrea, *Dunwoody Distinguished Lecture in Law: Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1054 (Dec. 2008) (implying there is too attenuated of a link to draw a causal correlation between student speech occurring off-campus and disruption within the school).

138. See Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1226-27 (2008) (discussing that the *Tinker* standard in regards to student cyberspeech cases and arguing that it is “the wrong tool for the wrong job”).

plainly offensive (*Fraser* exception), school-sponsored (*Kuhlmeier* exception), or can be seen as promoting illegal drug use (*Morse* exception).¹³⁹

1. Avery's Speech Did Not Fall within a *Tinker* Exception, so *Tinker* Should Have Controlled

The *Kuhlmeier* and *Morse* exceptions can quickly be rejected as irrelevant to Avery's case because her speech was not school-sponsored; it occurred in her free time from her home computer,¹⁴⁰ and it was not drug related.¹⁴¹ The *Fraser* exception is more difficult to dispel. In deciding the *Doninger* case, the Second Circuit failed to rely on the *Fraser* exception because it believed the *Fraser* standard to be unclear as to whether it applies to off-campus speech.¹⁴² Even though the court dismissed the *Fraser* exception as inapplicable, it seemed to focus primarily on the content of Avery's post.¹⁴³ Specifically, the nature of

139. See Dickler, *supra* note 35, at 369 (discussing the doctrinal uncertainty in the wake of the *Tinker* trilogy). See also *Doninger*, 527 F.3d at 48 (stating the standard to be applied is that "school administrators may prohibit student expression that will 'materially and substantially disrupt the work and discipline of the school,'" unless: (1) the speech is "vulgar or offensive" because school's have a duty to "teach[] students the boundaries of socially appropriate behavior," (2) educators' interests are "reasonably related to legitimate pedagogical concerns" in "exercis[ing] editorial control over school-sponsored expressive activities such as school publications or theatrical productions," or unless (3) the school is "tak[ing] steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"). The Second Circuit agreed that the *Tinker* test was the correct standard in deciding Avery's case, holding, "[b]ecause Avery's blog post created a foreseeable risk of substantial disruption at LMHS, we conclude that the district court did not abuse its discretion." *Doninger*, 527 F.3d at 43.

140. See *Hazlewood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

141. See *Morse*, 551 U.S. at 409. See also *supra* note 45 (discussing the limitations of the *Morse* holding).

142. *Doninger*, 527 F.3d at 49. The court said that it need not determine *Fraser*'s scope because it was uncertain whether *Fraser* applied to off-campus speech. *Id.* The court noted:

If Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court's precedents recognizing that the nature of a student's *First Amendment* rights must be understood in the light of the special characteristics of the school environment and that, in particular, offensive forms of expression may be prohibited.

Id. The Second Circuit believed that had Avery's comments occurred in the classroom, *Fraser* would certainly apply because there is nothing in the *First Amendment* that prohibits school authorities from discouraging inappropriate conduct in the school environment. *Id.*

143. See *id.* at 49-51. For example, the court noted: (1) "she called school administrators 'douchebags' and encouraged others to contact Schwartz 'to piss her off more' – contain[ing] the sort of language that properly may be prohibited in schools." *Id.* at 49. (2) Avery's language was "plainly offensive," "vulgar," and "potentially incendiary." *Id.* at 50-51.

her conduct was discussed on eleven pages of the Second Circuit's 21-page decision,¹⁴⁴ prompting one commentator to note:

The word "offensive" was used on nine occasions and appeared on five pages in the opinion; the word "vulgar" was used seven times and appeared on five pages; the word "civility" was used [four] times and appeared on four pages; the word "values" was used five times and appeared on four pages; and the specific "offensive" phrases used by Doninger ("douchebag" and "pissed off") were reiterated on nine separate occasions, appearing on six pages of the opinion.¹⁴⁵

That is an inordinate amount of time spent discussing what the Second Circuit deemed legally irrelevant, or at the very least, tangential to the principal legal analysis.¹⁴⁶ However, the Second Circuit deliberately indicated its reliance on *Tinker*.¹⁴⁷

2. The *Doninger* Court's Disapproval of Avery's Speech Motivated its Rulings: Avery's Conduct Failed to Meet *Tinker*'s Material and Substantial Disruption Standard Required to Regulate her Speech

The Second Circuit relied on three factors in determining that Avery's blog foreseeably created a risk of substantial disruption within the school environment.¹⁴⁸ First, the language Avery used to express her displeasure with the school's administration was "not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy."¹⁴⁹

What the court appeared to pay little regard was that this speech came from a sixteen-year-old high school junior, not a member of the Peace Corps. The court's reasoning is extreme and a bit out of touch

144. Nicole Black, *Commentary: Offensive Criticism Trumps First Amendment Rights*, DOLAN MEDIA NEWSWIRE: THE DAILY RECORD OF ROCHESTER, June 21, 2008 (discussing the Second Circuit decision in *Doninger* opens the door to the conclusion that any off-campus criticism of school administrators having the potential to cause a disruption on campus may result in school discipline). Nicole Black is an attorney for Fiandach & Fiandach and co-author of Criminal Law in New York, a West-Thompson treatise. *Id.*

145. *Id.* Black wrote that she could not help but wonder whether the disrespectful nature of Avery's comments was "the driving force behind the court's decision in this matter." *Id.*

146. *Id.* See also *supra* note 139 (discussing the principal legal approach a majority of courts utilize in resolving these claims).

147. See *Doninger*, 527 F.3d at 50.

148. *Id.*

149. *Id.* at 50-51. The court remarked that her chosen words "were hardly conducive to cooperative conflict resolution." *Id.*

with the current makeup of high school students' vocabulary.¹⁵⁰ High school students constantly subject the English language to continual transformation. "Bad" means good. "Retarded" no longer means having a mental handicap. "Gay" rarely means to be deliriously happy nor does it refer to a person's sexuality.¹⁵¹ "We no longer live in a literal world where words have one, single, tightly bound definition."¹⁵²

Moreover, Avery's online journal was not a place she should have been concerned with "resolv[ing] the ongoing controversy,"¹⁵³ but rather existed as a forum for her to vent and allow her peers to comment just the same as young people have been doing for generations.¹⁵⁴ In past

150. Posting of Mitchell H. Rubenstein to Adjunct Law Prof Blog: Law Review Ideas, http://lawprofessors.typepad.com/adjunctprofs/law_review_ideas (May 30, 2008) (discussing the Second Circuit decision in *Doninger* as a major student First Amendment decision involving blogs).

[T]his was a good student. She had a disagreement with the school and used the word [douchebag] The speech was off campus and the speaker was a high school student. This is exactly what the First Amendment protects. If this type of speech is not protected, then what type of speech will be protected? Is a student limited to merely saying "I disagree" or "please Mr. [P]rincipal, change your mind[?]" Is the problem with the speech here that the word [douchebag] was used? If so, then the court is completely out of touch [with] how students and others (lawyers too) talk to one another. Was there a real threat of disruption? I think not.

Id.

151. Besides meaning "homosexual" and "deliriously happy," gay is also used as an adjective to describe what the speaker feels is "stupid" or "lame." See Adam Sherwin, *Gay Means Rubbish*, *Says BBC*, TIMES ONLINE, June 6, 2006, at http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/article671972.ece (complaining of the word's use among British schoolchildren).

UrbanDictionary.com is a website consisting of slang terminology whereby users submit their own definitions of a word and other users vote on its accuracy. The top definition for the word "gay" provides the following explanation: "often used to describe something stupid or unfortunate . . . [For example,] 'Man these seats are gay. I can't even see what is going on!'" Urban Dictionary: Gay, <http://www.urbandictionary.com/define.php?term=gay> (last visited Sept. 20, 2009).

152. Posting of Franz Douskey to The Cool Justice Report, <http://cooljustice.blogspot.com/2007/09/douskeys-douche-bag-retrospective.html> (Sept. 7, 2007) (discussing how elders should lead by example in teaching compassion and patience toward our nation's youth). "Occasionally, I hear someone call someone else a douchebag. Usually it means how could that person do something so stupid. People laugh over it. Just like when people call each other schmucks, or pantloads, or jerkoffs." *Id.*

The top Urban Dictionary.com definition for the word "douchebag" is "[s]omeone who has surpassed the levels of jerk and asshole." Urban Dictionary: douchebag, <http://www.urbandictionary.com/define.php?term=douchebag> (last visited June 22, 2009). While this is hardly a scholarly website, it shows that the phrase is not limited to a literal translation.

153. *Doninger*, 527 F.3d at 51 (quoting the court's disdain of Avery's word choice).

154. See Papandrea, *supra* note 137 at 1037. "Although social networks, blogs, and text messaging are relatively new technologies, what young people do with them is . . . not that much different from what prior generations did without technology." *Id.* at 1036. Much of this litigation involving student speech on the Internet is the same quite harmless and at worst tasteless expression that went unpunished when young people voiced their opinions using diaries, landline phones, pig

decades, such displeasure would be voiced on the phone, in a diary, or in person.¹⁵⁵ This is the first generation to rely so heavily upon the Internet to keep in contact with one another. Although to these students it may seem like a private method of communicating, it is capable disseminating ideas to an unimaginably broader audience than any previous form of communication. Should all student blogs be subjected to the same scrutiny as Avery's? Imagine the ramifications.¹⁵⁶

Latin, or gossiping at the soda shop. *Id.* at 1036-37. "Students are going to be talking about their teachers and their classmates anyway; now they are simply using digital media to do it." *Id.* at 1093. "Indeed, members of the Court have pointedly noted that the expression at issue [in student speech cases, generally] would be plainly protected had it occurred in the fabled town square." *Id.* at 1089.

155. See Nicole Black, *Muzzling Minor Dissent*, DOLAN MEDIA NEWSWIRE: THE DAILY RECORD OF ROCHESTER, March 10, 2008. Nicole acknowledged that "[t]he blog post in question certainly is not a shining example of the diplomatic use of terminology," while pointing out that "[t]he method of delivery . . . is irrelevant, and the advent of new ways of communicating should not alter this conclusion. A blog post is no different than the use of a megaphone or mass mailing." *Id.* She also echoed Judge Sonia Sotomayor's remarks during the Second Circuit's oral arguments of the *Doninger* case, "[p]edagogical rights can't supersede the rights of students off campus to have First Amendment rights." *Id.*

156. See Papandrea, *supra* note 137, at 1030 (permitting school authorities to restrict student Internet speech expands their authority in a way previously unthinkable, thus exceeding *Tinker*'s scope and interfering with free speech rights outside the schoolhouse gate).

See also Posting of Lauren Doninger (Avery's mother) to The Cool Justice Report, <http://cooljustice.blogspot.com/2007/05/tin-horn-dictatorship-buries-write-in.html> (May 30, 2007) (discussing that LMHS should take pride in having produced students who are active in the democratic process and willing to protest). Ms. Doninger argued that students at LMHS are required to take a civics class with a course description which states, "this required course is designed to provide our students with a practical knowledge and understanding of our American Government . . . students [will] reconnect with democratic behaviors and institutions as citizens of the United States." *Id.* Ms. Doninger asserted that these lessons become "meaningless when basic democratic principles are abandoned by the school administrators who have treated the First Amendment rights of [LMHS] students with disdain." *Id.* Avery's mother believed that the email her daughter and three other students sent to taxpayers was a polite and well-written way to solicit help from parents which was in accordance with LMHS's published mission to "encourage creativity, initiative, and problem solving." *Id.* Based on Ms. Doninger's interactions with the administration, she gathered that Avery was withdrawn from the Senior Class Secretary Election because of a "failure of citizenship." *Id.* She asked her readers, "[i]s everyone who has mouthed off in frustration a bad citizen?" *Id.*

Avery weighed in on Principal Niehoff's accusation that she failed at citizenship:

I believe in democracy. I believe in the Constitution and the Bill of Rights. I believe that each citizen is responsible for participating in the maintenance of democracy by challenging government officials when they overreach. The principal accused me of failing to be a good citizen. I disagree. Apathy and passivity are poor citizenship. Rallying students and the community to petition the government is good citizenship. *I failed at vocabulary, not citizenship. However, the First Amendment does not limit protection to those with sophisticated vocabularies* (though I will not make the error of rudeness again).

Posting of Avery Doninger to The Cool Justice Report,

Second, the court argued that, “Avery’s post used . . . ‘at best misleading and at worst false’ information that Jamfest had been cancelled in her effort to solicit more calls and emails to Schwartz.”¹⁵⁷ The students were agitated and a sit-in was threatened because they feared that Jamfest would be cancelled.¹⁵⁸ Principal Niehoff and Superintendent Schwartz received an increase in calls and emails, causing them to be late to or miss school-related activities.¹⁵⁹ Avery and the other students who sent the email to the taxpayers missed class because of the need to manage the growing dispute.¹⁶⁰ The court held that “Avery’s conduct posed a substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest’s purported cancellation.”¹⁶¹ In a footnote, the Second Circuit maintained that the test to be applied for expression that had already been disseminated to other students was whether school officials “might reasonably portend disruption.”¹⁶² As such, the court expressly rejected Doninger’s argument that the disruption may have stemmed from the mass email of April 24, rather than Avery’s posting, on the grounds that *actual* disruption is not required.¹⁶³

The court opinions do not indicate that the defendants ever offered proof that the influx of calls to Principal Niehoff and Superintendent Schwartz were a result of Avery’s blog. While the court argued that all that is required is for school officials to reasonably portend disruption,

<http://cooljustice.blogspot.com/2008/05/making-world-safe-for-douche-bags.html> (May 30, 2008) (emphasis added) (discussing the importance of defending civil liberties and having leaders challenge unconstitutional practices). It sounds as though this teenager has pegged what the Second Circuit failed to distinguish, the difference between “shouldn’t have said” and “didn’t have a right to say.” See *id.*

According to Jonathan Turley, a law professor at George Washington University, the Second Circuit got this decision all wrong, stating, “[t]he continual expansion of the authority of school officials over student speech teaches a foul lesson to these future citizens. I would prefer some obnoxious speech than teaching students that they must please government officials if they want special benefits or opportunities.” Posting of Steve Collins to BristolToday.com, <http://bristolnews.blogspot.com/2009/05/sotomayor-under-scrutiny-for-doninger.html> (May 27, 2009, 16:37 EST).

157. *Doninger*, 527 F.3d at 51 (quoting the lower court’s decision).

158. *Id.*

159. *Id.*

160. *Id.* The court reasoned that it was foreseeable “that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery’s post.” *Id.*

161. *Id.* at 51-52.

162. *Id.* at 52 n.3 (citing *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) and relying on prior precedent, *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (U.S. 2008)).

163. *Id.* at 51.

there is no indication that the school received, or would receive in the future, *any* calls from Avery's post. Likewise, LiveJournal.com is a social networking site dominated primarily by the younger generation.¹⁶⁴ Because Avery's blog was predominately, if not almost exclusively, viewed by her peers, school officials should not have *reasonably* expected that Avery's post would encourage an older generation, those that likely sent the emails and made the phone calls, to contact administrators "to piss [them] off more."¹⁶⁵ Wouldn't this same older generation have been discouraged by Avery's immature rant? It seems *reasonable* to think that the generation making phone calls and sending emails to school officials would not be as familiar with the blog site Avery used to voice her displeasure. If they did happen to stumble across it, the older generation most likely would have written it off as an adolescent tirade. Adults would be more likely to respond to the carefully considered and more formal email that the Student Council members sent taxpayers.

Furthermore, the court noted that its decision relied on the fact that Avery's post was "at best misleading and at worst false."¹⁶⁶ LiveJournal's very purpose is to be used as "a private journal, a blog, a discussion forum or a social network."¹⁶⁷ Assuming, *arguendo*, that the information posted was false; there is no requirement that a LiveJournal post must be true.¹⁶⁸ It is commonplace for kids to be dishonest in their own journals; however, "*neither factual error nor defamatory content, nor a combination of the two, suffice[] to remove the First Amendment shield from criticism of official conduct.*"¹⁶⁹

Last, the court determined that "participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when

164. Nussbaum, *supra* note 1, at 2 (discussing the generation gap between people under 25 and the unnaturalness of "older people" utilizing such social networking sites).

165. *Doninger*, 527 F.3d at 45 (quoting Avery's blog post). See also *supra* note 185 and accompanying text (noting that Superintendent Schwartz required the assistance of her adult-son to actually find and access Avery's blog-post).

166. *Id.* at 51.

167. LiveJournal Home Page, <http://www.livejournal.com> (last visited Sept 23, 2009).

168. "Blogs and home pages provide young people an opportunity to engage in autobiographical expression and 'cathartic storytelling' that can promote self-realization and self-reflection." Papandrea, *supra* note 137, at 1034 (quoting Susan McKay et al., *Wired Whizzes or Techno-Slaves? Young People and Their Emergent Communication Technologies*, in TALKING ADOLESCENCE: PERSPECTIVES ON COMMUNICATION IN THE TEENAGE YEARS 185, 192 (Angie Williams & Crispin Thurlow eds., 2005), available at [http://faculty.washington.edu/thurlow/papers/McKay,Thurlow,Toomey-Zimmerman\(2005\)-chapter.pdf](http://faculty.washington.edu/thurlow/papers/McKay,Thurlow,Toomey-Zimmerman(2005)-chapter.pdf)).

169. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (affirming the Third Circuit's ruling that a stranger's illegal conduct does not prohibit a third person from exercising First Amendment rights) (emphasis added).

students fail to comply with the obligations inherent in the activities themselves.”¹⁷⁰ According to a well-respected treatise on education law:

Students have no right or property interest in participation in extracurricular activities. Participation is thus considered a privilege which may be extended or withdrawn at a board’s discretion . . . the discretion . . . is not without limit. A board *may not* . . . :

- Prevent students from participating as a penalty for the exercise of constitutional rights
- Extend or withdraw the privilege to participate arbitrarily¹⁷¹

While the court is correct in stating participation in extracurricular activities is a privilege, *the privilege cannot be revoked as a result of exercising the First Amendment right to freedom of speech*. As explained, it does not matter how slight the punishment; any time there is a First Amendment violation, there is irreparable harm.¹⁷² In the same way, school administrators cannot arbitrarily punish Avery for her blog post when the concerted group-drafted email was, in all likelihood, the primary reason for the increase in calls and emails.

In discussing the punishment itself, Principal Niehoff stated that Avery’s penalty was based on her “failure to accept Principal Niehoff’s prior *suggestions* regarding the proper means of expressing disagreement with administration policy and seeking to resolve those disagreements, and also because the blog included vulgar and inaccurate information.”¹⁷³ Because the Second Circuit decided that *Fraser*’s vulgar standard was inapplicable,¹⁷⁴ the punishment must stand based on Avery’s failure to accept Principal Niehoff’s *suggestions* regarding the proper means of expressing disagreement with administrative policy. Avery’s testimony indicated that Principal Niehoff’s suggestion

170. *Doninger*, 527 F.3d at 52. Extracurricular activities can be defined as those that are school sponsored which supplement, but are not part of, a required academic track. 3-8 MB, EDUCATION LAW § 8.07 (James A. Rapp 48th ed. 2009).

171. 3-8 MB, EDUCATION LAW § 8.07 (James A. Rapp 48th ed. 2009) (emphasis added). In addition, the view that there is no property right to participate in extracurricular activities is not uniform. *Id.* “A minority of cases holds that students have constitutionally protected interests in extracurricular activities.” *Id.*

172. *See supra* note 115 (discussing the standard of harm required for preliminary injunctive relief of a constitutional violation).

173. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 208 (D. Conn. 2007) (emphasis added). If the administration punished Avery because of her blog’s vulgarity, they certainly singled her out. The student who commented on Avery’s blog and referred to Superintendent Schwartz as a “dirty whore” was never punished and later received an award for good citizenship. Objection to Summary Judgment, *supra* note 131, at 26.

174. *See supra* note 122.

regarding acting in a manner appropriate to class officers did not occur until April 25, 2007, the day *after* her LiveJournal post.¹⁷⁵ The district court should have engaged in a fact-finding process to determine if a conversation about Avery's expected behavior took place prior to her LiveJournal post. If not, Principal Niehoff's justification for punishing Avery would have no substantive value.

What Principal Niehoff's testimony does reveal is that she told Avery that using the school computer system to send a personal email violated the school's internet policy.¹⁷⁶ However, Principal Niehoff informed Avery that Superintendent Schwartz deserved an apology, and that the students should send the taxpayers a corrective email.¹⁷⁷ Do administrators get to pick and choose what personal emails indeed violate the school's internet policy? It was unacceptable to send the first email, but Principal Niehoff recommended that the students break the internet policy once more for her own personal benefit. Giving administrators this sort of unfettered discretion could potentially chill all juvenile speech.¹⁷⁸

The punishment was also futile because Principal Niehoff was not aware of Avery's blog until May 7, 2007, thirteen days after Avery posted her blog.¹⁷⁹ The court's concern that administrators and teachers would be further diverted from their core educational responsibilities probably would have become moot almost two weeks later. Principal Niehoff did not inform Avery of her punishment until May 17,¹⁸⁰ 23 days after her LiveJournal post. The risk of disruption surely would have vanished in that time.

175. See *Doninger*, 514 F. Supp. 2d at 205. Avery's testimony revealed that she and Principal Niehoff encountered each other in the hallway. *Id.* Avery testified that Principal Niehoff told her that she was upset about the numerous phone calls and emails, that Jamfest was cancelled, and that she should draft an apology letter to Superintendent Schwartz. *Id.* Nothing in Avery's testimony suggested that the two ever conversed about Avery's duties as a class officer. Principal Niehoff testified that she told Avery, among other things, that she was disappointed the Student Council members had sent out an email to taxpayers, that the email contained incorrect information, that she was open to rescheduling Jamfest, and that the students had failed to act in a manner appropriate to class officers. *Id.* The court relied on other students' testimony that Jamfest was never definitively cancelled. *Id.* at 205-06. The court never mentioned whether they adopted Avery's or Principal Niehoff's testimony regarding whether the conversation about what constituted a class officer's appropriate behavior ever took place. If it did not, there may be another issue as to whether the school violated Avery's Due Process rights. Due Process violations are not discussed in this Note.

176. *Id.*

177. *Id.*

178. For more on this slippery slope, see *infra* Section IV.C.

179. See *supra* note 102 and accompanying text.

180. *Doninger v. Niehoff*, 527 F.3d 41, 46 (2d Cir. 2008).

Accordingly, the district court failed to show that Avery's speech met *Tinker's* standard of material and substantial disruption.¹⁸¹ The Second Circuit's reliance on the offensive nature of Avery's speech, coupled with Principal Niehoff's insistence that Avery's post was vulgar and inaccurate suggests that they merely disapproved of Avery's speech.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.¹⁸²

The school and the judiciary's condemnation of Avery's word choice should not be enough to elicit censure under *Tinker*.¹⁸³

B. The Doninger Courts Distinguished Their Rulings from Patterns Evolving in Lower Courts

Section II of this Note contains three categories of student speech in the lower courts: (1) Internet Speech Brought on Campus by the Speaker; (2) Internet Speech Brought on Campus by Another Student; and (3) Internet Speech that may Foreseeably Reach Campus.¹⁸⁴ There is no indication from either the District of Connecticut or the Second Circuit that Avery's blog was ever accessed by her or another student at

181. The district court's only mention of the school administration continuing to receive phone calls and emails after the April 25, 2007 meeting was that "the two administrators continued to receive phone calls and emails regarding Jamfest, and it is unclear which of those communications, if any, resulted from Avery's blog." *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 207 (D. Conn. 2007). The Second Circuit said only, "Schwartz and Niehoff . . . continued to receive phone calls and emails in the controversy's immediate aftermath." *Doninger*, 527 F.3d at 46 (emphasis added).

182. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

183. "The complaints simply do not rise to the level of a 'disruption' much less a 'material and substantial interference' . . . Certainly students . . . have a right to be 'upset' when confronted with a viewpoint with which they disagree." ACLU-CT Brief, *supra* note 57, at 12-13 (quoting *K.D. v. Fillmore Cent. Sch. Dist.*, No. 05-CV-0336(E), 2005 U.S. Dist. LEXIS 33871, at *16-17 (W.D.N.Y. Sept. 2, 2005)).

Avery's attorney, Jon Schoenhorn, argued that the Second Circuit's ruling would emasculate students' First Amendment rights. Posting of Arielle Levin Becker to The Cool Justice Report, <http://cooljustice.blogspot.com/2008/05/making-world-safe-for-douche-bags.html> (May 30, 2008). "If this [blog post] was potentially disruptive, then they might as well empty out half of the schools of not just Connecticut but probably in this country." *Id.*

184. *See supra* Section III.B.

LMHS.¹⁸⁵ While the purpose of her post was unquestionably to solicit action which would occur on campus, it cannot fall under category (1) because, unlike *J.S.*, Avery never accessed the website at school, nor told other students about the website, nor showed it to another classmate while at school.¹⁸⁶ Unlike *Layshock*, Avery's post did not cause the school's computer system to be shut down for five days nor was the school district's technology coordinator forced to dedicate 25 percent of his time to blocking students' access to her post.¹⁸⁷

Even assuming that we consider Mrs. Schwartz's adult son a "student" at LMHS and thus classify Avery's speech in category (2), courts are split as to whether the speech is protected under a student's First Amendment rights.¹⁸⁸ While the Second Circuit decided *Wisniewski* only one year before the *Doninger* case, Martin's speech was far more taboo than Avery's speech.¹⁸⁹ The court rejected Principal Niehoff's broad reading of *Wisniewski* that schools may regulate off-campus offensive speech like Avery's, as long as it is "likely to come to the attention of school authorities."¹⁹⁰ Relying on the *Wisniewski* test, as articulated in *Tinker*, the Second Circuit determined that Avery's post would foreseeably reach school property.¹⁹¹ However, what the Second Circuit did not mention was that her post reached school grounds not

185. See *Doninger*, 527 F.3d at 46 (finding that the administration learned of Avery's LiveJournal post only after Superintendent Schwartz's adult son found it while using an internet search engine).

186. See *supra* Part II.B.1.

187. *Id.*

188. See *supra* Part II.B.2.

189. In *Wisniewski*, the Second Circuit followed *Tinker* in holding that a student may be punished for expressive conduct occurring off school grounds when this conduct "would foreseeably create a risk of substantial disruption within the school environment," *only if* it was "similarly foreseeable that the off campus expression might also reach campus." *Doninger*, 527 F.3d at 48. The court thought Judge Newman's concurrence in *Thomas v. Board of Education* to be applicable to Avery's case. Judge Newman observed, "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." *Id.* (quoting *Thomas v. Bd. of Educ.*, Granville Cent. Sch. Dist., 607 F.2d 1043, 1058 (2d Cir. 1979) (Newman, J., concurring in the result)).

190. *Id.* at 50. However, the Second Circuit did accept Niehoff's alternative argument that Avery's speech met the *Tinker* standard. The Second Circuit affirmed the district court's ruling even though the lower court did not expressly rely on *Tinker*. *Id.* In so deciding, the Second Circuit opted not to decide which other standards to apply when considering the extent to which a school may discipline off-campus speech. *Id.*

191. *Id.* Although Avery's speech was created off-campus, the court argued that it was purposely designed to come onto campus. *Id.* "The blog posting directly pertained to events at LMHS, and Avery's intent in writing it was specifically to encourage her fellow students to read and respond." *Id.* Avery's classmates did indeed read and post comments in response to Avery. *Id.* The Second Circuit noted that Avery's post managed to reach school administrators. *Id.*

through any action by her or fellow classmates, but from an administrator's son searching his mother's name. It seems incomparable to analogize a homicidal "buddy icon" to a blog post referring to the administration as "douchebags."¹⁹² Additionally, Wisniewski's administration had warned students that threats would be treated as acts of violence and would not be tolerated.¹⁹³ Avery's post fell well short of even implying a threatening or violent nature, nor is there any evidence that the student body was warned of such a strict intolerance.

Courts which have decided cases falling into category (2) have strayed from the Second Circuit's holdings and have ruled that a student's speech is protected by the First Amendment.¹⁹⁴ The *Doninger* facts draw more similarities to these cases. In *Killion*, Zachariah actually distributed his "Top Ten" list via email to his friends,¹⁹⁵ whereas Avery passively posted her displeasure on an online journal. Like Zachariah's list, Avery's post was created off school grounds; there is no evidence that Avery brought the list onto school grounds, and the school district arguably failed to meet *Tinker*'s substantial disruption standard.¹⁹⁶ Avery's language was arguably less offensive than

192. Avery's attorney voiced his concern with the Second Circuit's decision to follow *Wisniewski*, stating, "[t]hey appear to equate words with bullets . . . And that is a scary prospect to me." Becker, *supra* note 179.

Some commentators believe that student speech "cannot become on-campus speech simply whenever a third party or a school official brings or accesses the material on the Internet at school." Papandrea, *supra* note 137, at 1057.

193. See *supra* text accompanying note 58.

194. See *supra* Part II.B.2.a. and *supra* Part II.B.2.b.

195. See *supra* notes 63-65 and accompanying text.

196. See, e.g., *supra* note 63-65 and accompanying text (discussing the Western District of Pennsylvania's holding in *Killion*); *supra* Part IV.A.2 (discussing why Avery's conduct failed to meet the *Tinker* standard). See also *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) (holding that "[t]he district court thus correctly determined that in these circumstances, 'it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it.'" (citing *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 217 (D. Conn. 2007)). The *Tinker* test is not whether it was "reasonably foreseeable" that the administration would become aware of Avery's post, but whether her actions would materially and substantially interfere with the school's operations. See *supra* text accompanying note 24 (discussing the *Tinker* standard). Neither the District of Connecticut nor the Second Circuit provided significant analysis as to whether the emails and phone calls to the school for a few days (arguably not enough to invoke a *substantial* disruption) came as a result of the students' emails to the taxpayers or as a result of Avery's post to an obscure online site.

"Substantially" means just that. Mere student "buzz," i.e. animated discussion in response to the speech content, does not rise to the level of "substantial disruption" . . . Nor do the shock, outrage, revulsion or hurt feelings of teachers or administrators . . . Rather, the anticipated disruptive effect must be severe enough to threaten academic "discipline" to the point where the school cannot "operate normally."

ACLU-CT Brief, *supra* note 57, at 3.

Zachariah's because it did not personally attack her administrators' appearance nor did it tastelessly refer to their genitalia.¹⁹⁷

Under category (2), Avery's actions were probably most similar to Brandon Beussink's conduct. Both Brandon and Avery posted inappropriate language to a website to express displeasure with the school's administration. Brandon's behavior went one step further in that he created his *own* website for the purpose of criticizing the faculty and staff and posted a link to his school's homepage, hoping his readers would contact the school's principal with their disapproval.¹⁹⁸ The Eastern District of Missouri found that Brandon was wrongfully suspended because his punishment was a result of the administration being upset with his actions.¹⁹⁹ Likewise, Avery's discipline came twenty-three days after her controversial language was posted online.²⁰⁰ The lingering effects of her words were probably an upset administration rather than a material and substantial disruption that lasted almost three and a half weeks.

However, because Avery's speech was neither brought on campus by her nor by another student, it seems that its most logical fit would be under category (3): Internet Speech that may Foreseeably Reach Campus. The Eastern District of Michigan upheld a student's First Amendment rights when he posted murder "missions" on a webpage after admitting that school computers "may have been used to create the website."²⁰¹ If a court can uphold a student's free speech rights in creating a website which listed fellow students as people he wished would die,²⁰² courts should likewise uphold Avery's right to use questionable, juvenile language to vent her disapproval.

Similarly, the Second Circuit should have followed the Western District of Washington's decision in *Emmett*.²⁰³ Like Avery, Nick Emmett was a good student, actively involved in extracurricular activities, and had no disciplinary background.²⁰⁴ While Nick's speech was arguably more distasteful than Avery's speech in that his website

197. See *supra* note 63 (reproducing Zachariah's "Top Ten" list).

198. See *supra* note 67 and accompanying text.

199. See *supra* note 70 and accompanying text.

200. See *supra* note 171 and accompanying text.

201. See *supra* notes 71-74 and accompanying text.

202. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (holding that Joshua listing names under the heading "people I wish would die" was no more of a threat to those listed than Joshua listing names under the heading "people that are cool" make those listed therein "cool").

203. See *supra* notes 75-79 and accompanying text.

204. See *supra* note 75.

provided “mock obituaries” of his friends and allowed visitors to vote on who would “die” next, the court held that Nick’s language was far too removed from school activities for the school to regulate it.²⁰⁵ For the Second Circuit to rule that LMHS administrators could punish Avery for her speech gives the administration an extraordinary around-the-clock power to police student lives and student morals.²⁰⁶ Accordingly, under either category (2) or (3), Avery would have prevailed had the *Doninger* courts followed the standard developing in the lower courts instead of following its own agenda.²⁰⁷

C. Recommendations for a More Workable Standard

1. The Supreme Court Must Decide This Issue to Create a Standard That Lower Courts Can Universally Apply

Even though most courts continue to apply the *Tinker* test to student Internet speech cases, the Supreme Court must offer guidance to lower courts in order to achieve consistency.²⁰⁸ Some commentators believe *Tinker* to be an effective test,²⁰⁹ while others believe it is the “wrong tool” for the job.²¹⁰ As it stands, “[t]here is no clear line . . . And the line appears to be moving.”²¹¹

205. See *supra* text accompanying note 79.

206. See ACLU-CT Brief, *supra* note 57, at 5; for further discussion. See *infra* Part IV.C.1.

207. The district court did not see Avery’s punishment as “discipline” but rather the denial of a privilege, which the court did not believe to implicate her First Amendment rights. Black, *supra* note 151.

The [district] court [in *Donniger*] decided to engage in the creative endeavor of redefining “discipline” and “reality” rather than accepting an unpalatable alternative: acknowledging that students have the constitutional right to criticize school administrators, as long as the on or off-campus critique does not “substantially and materially interfere” with school operations or the dissent levied on-campus is not lewd, profane or sexually explicit.

Id. (referring to the *Tinker* and *Fraser* standards).

208. See Papandrea, *supra* note 137, at 1065. “The lower courts are all over the map” in the way they apply Supreme Court precedent. *Id.*

209. See, e.g., Hudson, Jr., *supra* note 4, at 21.

“I actually think *Tinker* is a good balance . . . You have the right to swing your fist in the air until it threatens the security of my nose. You have the right to express your thoughts freely, until your expression of thoughts is or has the potential of causing substantial harm. We all need to be able to deal with disagreements, and people in positions of authority certainly must deal with the expression of speech that challenges their exercise of authority. But trashing other people for the enjoyment of trashing other people does not serve any purpose.”

Id. (quoting Nancy Willard of the Center for Safe and Responsible Internet Use).

210. Brenton, *supra* note 137, at 1226-27.

Any off campus speech, by any speaker, may create a material and substantial disruption on campus. If Mary Beth Tinker had appeared on the evening news to protest the

The *Tinker* standard is unworkable in the Internet age because many courts are far too deferential to the schools' claims that the student speech caused substantial disruption without applying their own independent analysis.²¹² Instead of trying to modify the *Tinker* standard to account for technology advances, courts should employ an entirely different standard. Punishment based on student speech originating from students' home computers should be subjected to such a heightened scrutiny, with regulations only being warranted if it is of such low value as to be considered "unprotected."²¹³ This type of expression differs from all other types considered by the Supreme Court because it requires affirmative steps for access, making its medium of expression much less pervasive than any of the Supreme Court cases already decided.²¹⁴ In addition, regulating student speech occurring off school grounds opens the floodgates for school administrators to regulate almost all student speech.²¹⁵ Because Internet speech frequently concerns topics related to

Vietnam War, it could have caused a greater disruption of her school than her black armband, but such speech should be no more regulated than silent protest. To employ the *Tinker* test to answer the threshold question of when [student cyberspeech should be regulated] is to use the wrong tool for the wrong job.

Id.

211. Hudson, Jr., *supra* note 4, at 19 (quoting Nancy Willard).

212. Papandrea, *supra* note 137, at 1067 (citing *Cuff v. Valley Centr. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008) (noting deferential approach of courts to First Amendment challenges to schools disciplining students) and *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1389-92 (D. Minn. 1987) (noting that deference to school officials is not limitless, yet concluding that the school could punish students even though distribution of an underground newspaper did not disrupt any regular school activity). "[C]ourts generally permit the unreasonable reaction of teachers and school officials to constitute a disturbance." Papandrea, *supra* note 137, at 1067.

213. See *supra* note 47. "As a bright-line rule, courts should continue to declare that speech that lacks any sort of physical connection to the school should fall outside the school's jurisdiction." Papandrea, *supra* note 137, at 1090.

214. See *supra* note 102 (noting the indirect fashion in which Avery's blog post reached the attention of school administrators).

215. See *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979):

It is not difficult to imagine the lengths to which school authorities could take the power . . . it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. . .

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts Since superintendents and principals may act "arbitrarily, erratically, or unfairly," the chill on expression is greatly exacerbated.

classmates and teachers, permitting school authorities to restrict such speech gives schools unbridled discretion to restrict juvenile speech generally.²¹⁶

2. School Administrators Cannot Punish Student Online Expression Merely Because They Disapprove of the Message

When schools rely on the “I do not like the speech the student chose to use” rationale, courts have a tendency to invalidate the student’s punishment.²¹⁷ “[T]he government may not prohibit expression simply because it disagrees with its message”²¹⁸ However, when administrators can provide evidence of how the student’s speech substantially negatively impacted the school’s operations, courts are more likely to uphold the school’s disciplinary measures.²¹⁹ Because courts cannot prohibit speech because of a “mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint,”²²⁰ courts imposing a presumption that the student’s speech is protected under the First Amendment would largely reduce the ad hoc balancing tests that result in as many different outcomes as there are

(citing *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 809 (2d Cir. 1971)). Allowing school officials to regulate speech whenever it comes to their attention would grant them the power to punish students who engage in political protests outside city council meetings, write inept letters to the editor in the local newspaper, or simply talk with friends at the mall. Papandrea, *supra* note 137, at 1092.

216. *Id.* at 1091. “Given this reality, it is hard to imagine when it would not be directed to campus, or when it would not be reasonably foreseeable that students’ digital expression would come to the school’s attention.” *Id.* at 1091-92.

217. *See, e.g.*, *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998). “Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.” *Id.* at 1180.

218. *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (stating the First Amendment prohibits viewpoint based laws, “[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.”) *Id.* at 420.

219. *See, e.g.*, *supra* notes 50-52 (discussing the Supreme Court of Pennsylvania’s holding in *J.S. v. Bethlehem Area School District*). *See also* Posting of “SHG” to The Cool Justice Report, <http://cooljustice.blogspot.com/2008/05/more-coverage-of-douche-bag-court.html> (May 30, 2008) (stating that the Ninth Circuit did not provide evidence of how Avery’s remarks created a foreseeable risk of substantial disruption):

While the earlier rule [*Tinker*] held that students maintained a constitutional right to speech, even within the school yard, the [Ninth] Circuit’s vision is that they not only forfeit speech going into the school, but do so again on the way out. Avery’s challenge to school officials’ hegemony was made in a blog post, well beyond the proverbial schoolhouse gates of the past The test applied by the Circuit is extremely curious . . . weeding out acceptable exercise of Freedom of Speech because it had the potential to create thought and ideas that might be disruptive fundamentally undermines the right.

Id.

220. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

jurisdictions. Furthermore, Internet-use policies should be written in a way that clearly defines prohibited conduct. If school districts do not provide students with clear guidelines, they open themselves up to possible due process claims when they punish students who violate an ambiguous policy.²²¹

3. School Officials May Resort to Alternative Measures to Address Harmful Material Students Post on the Internet

School administrators do not have to ignore harmful material surfacing online even if their authority may be limited. Before infractions occur, schools should educate their students on how to use the Internet safely and responsibly. If students do not comply, there are alternatives to school-sanctioned punishment, such as notifying the parents or police, talking to the students involved, and offering support services to any troubled student.²²² If speech is so endangering as to become actionable, the courts provide an adequate remedy that is sufficient to punish truly threatening behavior.²²³ Schools can effectively ensure that troubled students receive the help they need without overzealously policing their every online commentary.

More importantly, parents are far better suited to monitor and regulate their child's online behavior.²²⁴ "Parents still have their role to play in bringing up their children, and school officials, in such instances,

221. See *supra* note 175 (discussing due process in *Donniger*). See e.g., *Coy v. Bd. Of Educ. Canton City Schools*, 205 F.Supp.2d 791, (N.D. Ohio 2002) (discussing a student challenge to a high school's discipline codes and internet-use policies).

222. See, e.g., Hudson, Jr., *supra* note 4, at 26. "There is a lot that schools can do short of imposing disciplinary actions, such as educating kids about responsibilities online and educating parents about the Internet. If a school official is aware of cyberbullying, one option is . . . [to] call the parent of the student." *Id.* (quoting National School Boards Association Staff Attorney Thomas Hutton).

223. See Brenton, *supra* note 138, at 1244 (stating that the juvenile justice system protects against "true threats" and punishes dangerous behavior).

224. Cf. Thomas E. Wheeler II, *Lessons from The Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 Educ. L. Rep. 227, 244 (2007) ("While school administrators are given broad discretion . . . they must resist the temptation to over regulate The ethical responsibility for individual conduct must rest with the individual, and not the schools. The primary teachers are parents and families, not governmental agencies.").

Avery's mother did indeed "police" Avery's poor choice in words. "My mother also put my word choice on her scale of justice. She found my comment rude, sophomoric, and below the standards she has set. My mother's verdict, as one commentator put it, 'Avery, you're grounded and we're going to the Supreme Court.'" Avery Doninger, *supra* note 152 (quoting Colin McEnroe, WTIC radio AM 1080 broadcasted October 2, 2007).

are not empowered to assume the character of *Parens patriae*.”²²⁵ Instead of simulating a parental role, school officials might want to discuss the possible consequences of Internet speech, its lack of anonymity, and the real harms that speech can cause.²²⁶

V. CONCLUSION

Student Internet speech may be tactless and inflammatory, causing infinite problems for school administrators attempting to maintain order and teach civility to young people.²²⁷ Nevertheless, students are entitled to First Amendment rights in public schools, even if the rights are somewhat limited.²²⁸ This Note proposes that under current Supreme Court precedent, Avery Doninger’s speech did not materially and substantially disrupt her school’s operations.²²⁹ In the alternative, this Note explains that the District of Connecticut and the Second Circuit should have followed evolving lower court precedent in their *Doninger* holdings because Avery’s language was not brought on-campus by her or another student but rather it was speech that may have foreseeably

225. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (holding that a county board of education could not suspend students for publishing and distributing a satirical paper almost exclusively produced after school hours and off school property).

226. *See* Nussbaum, *supra* note 1, at 3. “A truly private life is already an illusion . . . [High school students seem] to have a high tolerance for what used to be personal information splashed in the public square.” *Id.* at 5. Consider Casey Serin, who purchased eight houses in eight months, looking to “fix ‘n’ flip,” only to end up in massive debt. *Id.* at 5. He detailed his bad investments online. According to Serin,

Once you put something online, you really cannot take it back . . . You’ve got to be careful what you say – but once you say it, you’ve got to stand by it. And the only way to repair it is to continue to talk, to explain myself, to see it through. If I shut down, I’m at the mercy of what other people say.

Id. at 5. While this story may seem irrelevant to the subject matter, it is important for school officials to get the point across to their students that they will be accountable for all material posted online. According to Vic Walczak of the ACLU of Pennsylvania,

Kids have to understand there is a practical difference between playground/water-cooler talk and posting something on the Internet When you post something on the Internet, there can be REAL-WORLD consequences. Some of the stuff on the Internet is mind-boggling While school officials may not legally be able to punish you, there may be other real-life consequences that should give students pause about posting something the whole world can see.

Hudson, Jr., *supra* note 5, at 24.

227. *See supra* Section II.

228. *See id.*

229. *See supra* Part IV.A.2.

reached campus.²³⁰ Lower courts have traditionally upheld a student's constitutional right to speak such language.²³¹

This Note cannot offer a perfect solution that would ensure that school administrators know which speech they may punish and which student speech has constitutionally protected interests. Nor may there be a perfectly articulable checklist that the Supreme Court may establish to offer school officials. Instead, this Note proposes that the High Court create a more workable standard to offer *some* guidance in an emerging area of law that has not been re-evaluated since the days of the Vietnam War.²³²

230. See *supra* Part II.B.3.

231. *Id.*

232. See *supra* Section IV.C.

Some commentators believe that Judge Sotomayor's appointment to the Supreme Court may have harsh implications for the First Amendment:

Blogger Paul Levinson, a professor of communications and media studies at Fordham University, has followed Avery's case from the outset and believes that President Obama made a mistake in nominating Sotomayor. Posting of Steve Collins to BristolToday.com, <http://bristolnews.blogspot.com/2009/05/sotomayor-under-scrutiny-for-doninger.html> (May 27, 2009, 16:37 EST). According to Levinson, "[l]ast time I checked, I thought our democracy and freedom were predicated on the principle that all people have a right to express their opinions, which must certainly include disrespect for authority." *Id.* In declaring the First Amendment the most primary Amendment for protection of freedoms, Levinson asked, "[i]sn't performance on the Appellate Court the best possible gauge of performance on the Supreme Court? Are not the stakes on the Supreme Court just too high, too lasting, to take a chance on an Appellate judge with even just one bad decision?" Why One Strike Against the First Amendment Should Rule Sotomayor Out of the Supreme Court, <http://paullevinson.blogspot.com/2009/05/why-one-strike-against-first-amendment.html> (May 26, 2009) (using a baseball analogy to discuss how Sotomayor is not the best person to appoint for the rest of her life to one of nine positions on a Supreme Court dominated by Justices who narrowly interpret the First Amendment).

The National Coalition Against Censorship recognized that in the *Doninger* holding, the Second Circuit was comprised of two conservative-leaning judges and Judge Sotomayor, who may have been influenced by her right-leaning peers. Posting of Hannah Mueller to The National Coalition Against Censorship, <http://ncacblog.wordpress.com/2009/06/02/student-speech-under-fire-under-sotomayor/> (June 2, 2009, 08:51 EST). However, "[f]rom what we've seen so far, Sotomayor has done more to weaken First Amendment rights than to protect them." *Id.*

Some commentators have used a statistical approach to argue that Sotomayor is not as liberal as President Obama may have people believe. Posting of Zach Miners to Yahoo! News, <http://news.yahoo.com/s/usnews/wheredoesjudgesoniasotomayorstandonschoolissues> (June 12, 2009, 15:49 EST). Perry Zirkel, a professor of education and law at Lehigh University, believes that Sotomayor's record suggests that she is conservative on education issues. *Id.* Zirkel's analysis showed that Sotomayor ruled in favor of school districts 83 percent of the time in decisions on "regular education" and 58 percent of the time in decisions on special-education cases. *Id.*

Other commentators have not been so academic in their assessments. Sotomayor is known as a dominating personality who is very tough during oral argument, leading blogger Alex Knepper to wonder "whether the case would have been different had it been a young Latina girl complaining about the cancellation of a cultural festival." Sonia Sotomayor: Free Speech Opponent?, <http://race42008.com/2009/05/28/sonia-sotomayor-free-speech-opponent/> (May 28, 2009, 24:10 EST). Andy Thibault, whose Cool Justice Report has followed the *Doninger* case from

the start, said that Sotomayor “was clubbed on the head with a crystal-clear free speech violation and she said, in effect, ‘That’s nice, I’ll sign off on it.’ When a citizen seeks a redress of a grievance and is punished for lobbying the community, that’s OK with Sotomayor.” Posting of Steve Collins to BristolToday.com, <http://bristolnews.blogspot.com/2009/05/sotomayor-under-scrutiny-for-doninger.html> (May 27, 2009, 16:37 EST).

Because this issue is so novel to the Supreme Court’s First Amendment jurisprudence, I could not accurately predict how it would handle Avery’s case. Even under current Supreme Court precedent, the First Amendment should protect a student’s right to call her school officials “douchebags” or to lobby citizens for support, even if it is intended to “piss off” administrators. Though Sotomayor endorsed the *Doninger* ruling by voting for it, she may not agree with every detail and nuance of the opinion.